89-1530

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

vs.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal agencies must implement the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) where they have approval power over three critical aspects of a non federal development project, without which approvals, or any of them, the project is not at all possible.

2. Whether under NEPA and NHPA a federal agency is to consider the indirect and off site impacts of its actions on historic properties.

PARTIES BELOW

The Petitioner is a Nebraska non profit corporation, People For Responsible Omaha Urban Development (PROUD). The Respondents are the Army Corps of Engineers, the National Park Service, the Interstate Commerce Commission, ConAgra, Omaha Development Foundation (ODF), the City of Omaha, and the County of Douglas. The National Trust for Historic Preservation intervened below in support of PROUD. Mercer Management Company and Roger Durand were plaintiffs with PROUD.

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OPINIONS BELOW

No opinion below has been authorized for publication including the opinion of the Circuit Court of Appeals. Magistrate Kopf, District of Nebraska, sitting as a Master, held a bifurcated trial and issued Findings and Recommendations on July 28, 1988 (App., pp. 1-73), covering issues the Petitioner relies on here and January 20, 1989, covering issues the Petitioner does not appeal from. District Judge Warren Urbom ruled upon the first Findings and Recommendations December 12, 1988 (App., pp. 74-105) and entered judgment February 14, 1989 (App., pp. 106-107). Petitioner's appeal was denied by the Court of Appeals for the Eighth Circuit on September 14, 1989, by an opinion not to be published and appearing in the Appendix at pp. 112 to 115. With the exception of a temporary stay granted by the Circuit on March 1, 1989, to June 9, 1989, (App. 108-111), no decision has favored the Petitioner except that its standing was confirmed.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered September 14, 1989. A Petition for Rehearing and Hearing En Banc was denied October 20, 1989 (App., p. 118). Justice Blackmun by order of January 12, 1990, granted PROUD's and the National Trust's Application to extend the time for filing this petition. That order extended the time for filing this petition to February 16, 1990. A petition on photocopy process was timely presented to the Clerk of Court, and on advice of the Clerk's office this petition, conforming to

Rule 33, is timely filed. Jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTES AND REGULATIONS INVOLVED

National Historic Preservation Act 16 USC 470(f):

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act [16 USCS §§ 470i et seq.] a reasonable opportunity to comment with regard to such undertaking.

Advisory Council on Historic Preservation 36 CFR 800.2(o)

> (o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section. 106.

36 CFR 800.2(c)

(c) "Area of potential effects" means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.

National Environmental Policy 42 USC 4332(2)(C)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall – . . .

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> > (i) the environmental impact of the proposed action,
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> > (iii) alternatives to the proposed action,
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

Council on Environmental Quality 40 CFR 1508.8

§ 1508.8 Effects

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under

the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). . . .

(b) Federal actions tend to fall within one of the following categories:

. . .

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

STATEMENT OF THE CASE

1. Jurisdictional basis of initial proceedings.

PROUD filed its case in the United States District Court for the District of Nebraska in March, 1988, asserting violations of federal law, especially the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). The statutory basis for district court jurisdiction included 28 USC 1331 (federal question), 28 USC 1361 (provides for compelling a federal officer to act), and 28 USC 2201 & 2202 (provides for declaratory judgments and relief required thereby).

2. Historic facts on Federal presence in the affected area.

This case involves the largest single destruction of historic property since the enactment of the National Historic Preservation Act.

The 113 acre area tract that is the subject of this suit sits on the west bank of the Missouri River and forms a part of eastern downtown Omaha. In the 1940's, just up from the river bank, the Corps of Engineers built a floodwall for Omaha with related pump and sewer works that protect a large portion of the 113 acres, together with other parts of lower downtown, from flooding.

Historically, the eastern two-thirds of the area was laced by rail tracks, some that services local business and warehouses, but most were spur lines which had been inactive for years. When the subject development plan was hatched, the Union Pacific Railroad was running a train a day to and from Council Bluffs, Iowa, to and from

North Omaha businesses, averaging forty cars a day each way through the 113 acre area over a Union Pacific track called Side Hill Lead. It pierced the 113 acre tract on a generally east-west basis, joined up with a rail along the floodwall at a point in the 113 acre area where Union Pacific owned the floodwall rail. South of that point Burlington Northern owned the floodwall rail.

The idea of a public park in the tract had been around from the early 1970's. Douglas County had solicited* and received $750,000.00 from the National Park Service between 1978 to 1986, which money was used by the County to acquire some of the land in the tract that would be used for a park and some of the funds went to a set of park plans drawn up in 1983. Other state and county funds went into the acquisition of land and planning.

Anchoring the west end of this 113 acre parcel was the six block Jobbers Canyon warehouse district that housed many businesses. One warehouse in 1985 had been converted to luxury apartments. In December, 1986, upon nomination by the City of Omaha, Jobbers Canyon was entered upon the National Register of Historic Sites as Jobbers Canyon Historic District.

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*Part of the solicitation extolled Jobbers Canyon as a complement to the park. The idea was that renovation of some of the warehouses into residences would provide some park users.

3. Jobbers Canyon threatened by Riverfront Redevelopment Plan.

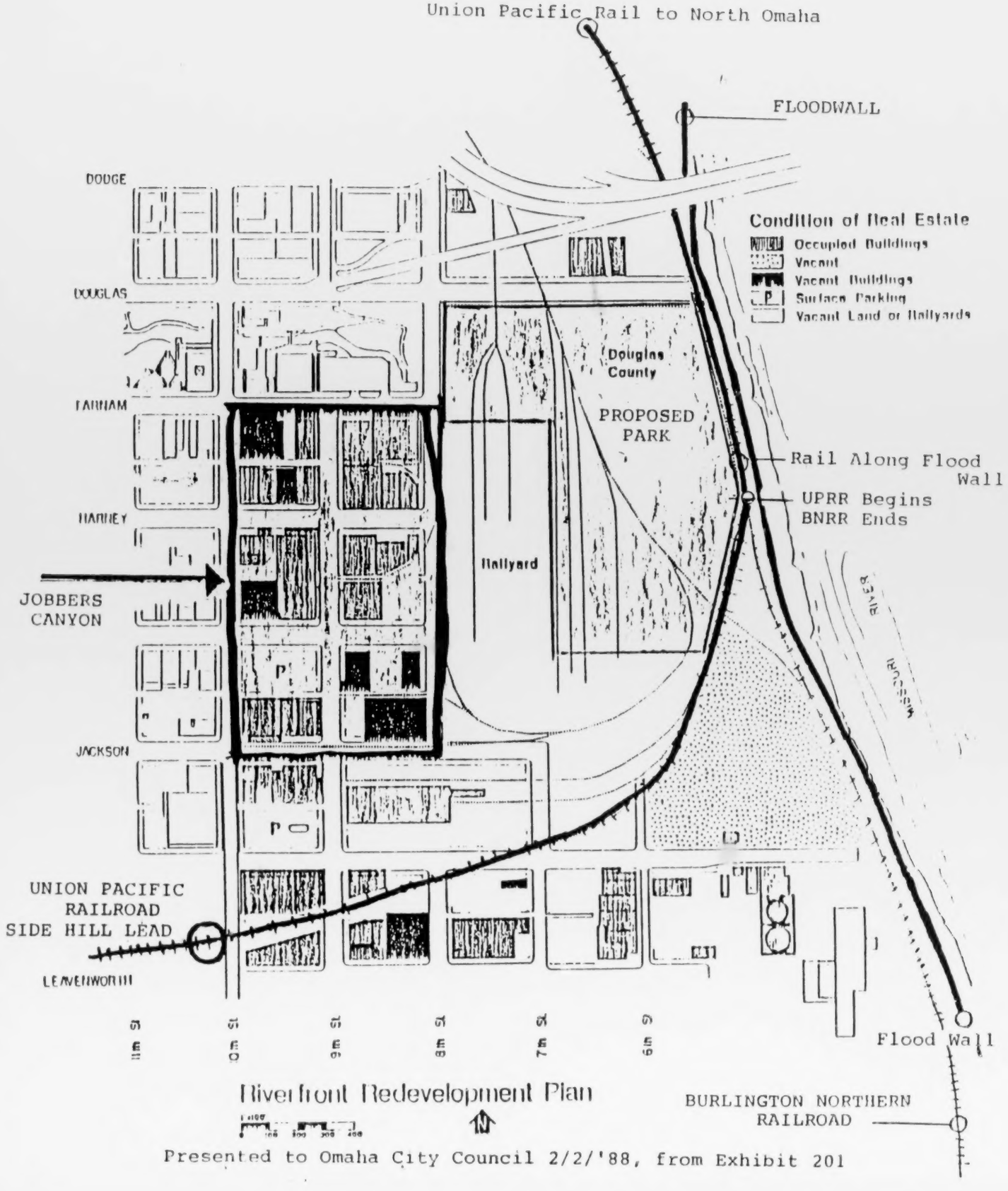
In mid 1987, the City, ODF, ConAgra, and Douglas County commenced discussions aimed at developing the 113 acre tract. Against initial protests quickly abandoned by the City, ConAgra insisted that if it were part of any deal, *Jobbers Canyon would have to be demolished* to both make room for ConAgra's desire to have a campus-like headquarters and to satisfy its sense of green lawn aesthetics. Barely six months after getting Jobbers Canyon on the National Register, the City was developing a plan for the 113 acres that would require the total demolition of Jobbers Canyon.

The City Planning Department published its Riverfront Redevelopment Plan on January 12, 1988. The City Council approved the plan February 2, 1988. ConAgra, the City, County, and ODF came quickly to substantial agreement implementing the plan by March 15, 1988. The County would develop the park including removal of sewers within the park boundaries. The City would provide streets, remove and reroute sewers and provide sewer needs for ConAgra, and would persuade the Burlington and UPRR to reroute rail traffic so that all rail traffic could move along the floodwall line out of sight behind a berm. The City would prepare, grade, and present ready for building the 65 acres or so devoted to ConAgra. ODF, having options on most of Jobbers Canyon even before the Plan was published, would raise money to buy and demolish Jobbers Canyon. ConAgra would build its campus. ODF would finance the park.

4. Approval roles of Corps of Engineers, National Park Service and Interstate Commerce Commission.

The proposed transformation of the 113 acres is graphically and accurately enough for these purposes shown on the before and after renderings on the next two pages.

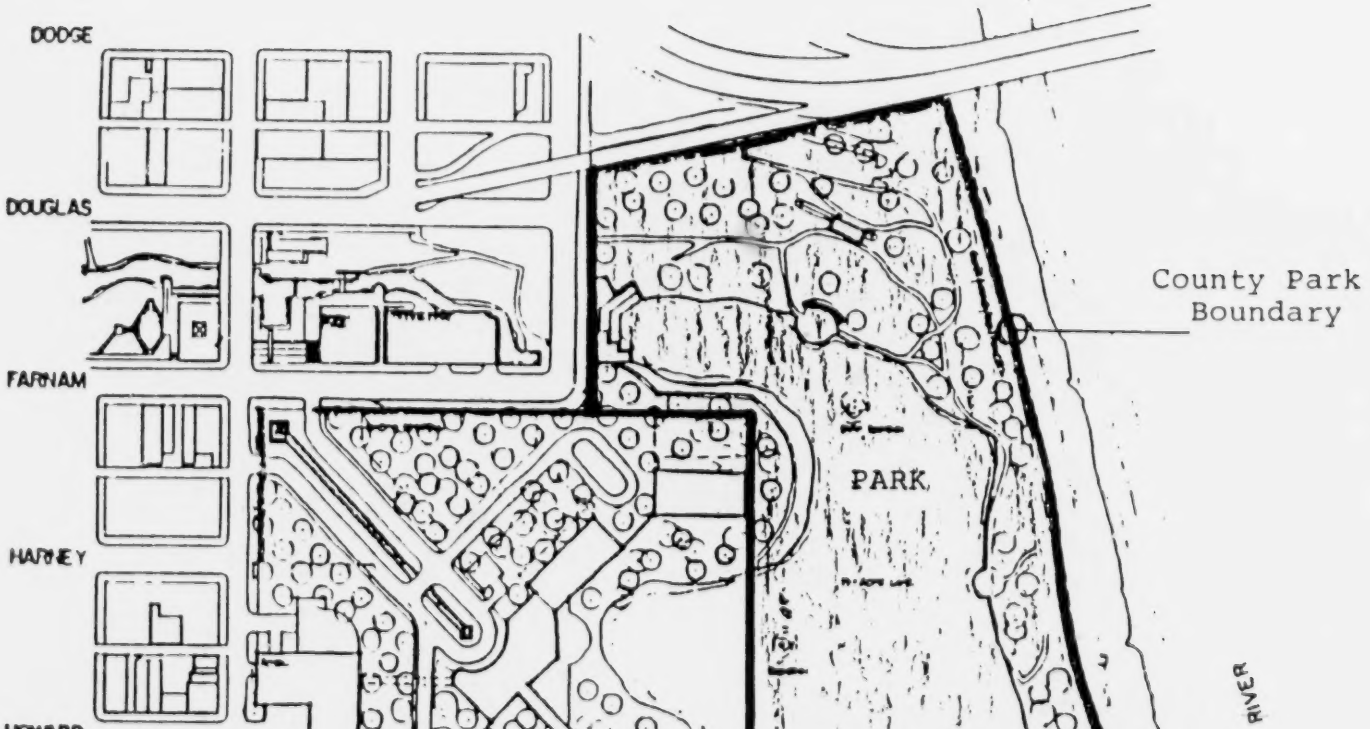
BEFORE



Riverfront Redevelopment Plan

Presented to Omaha City Council 2/2/'88, from Exhibit 201

AFTER


DODGE
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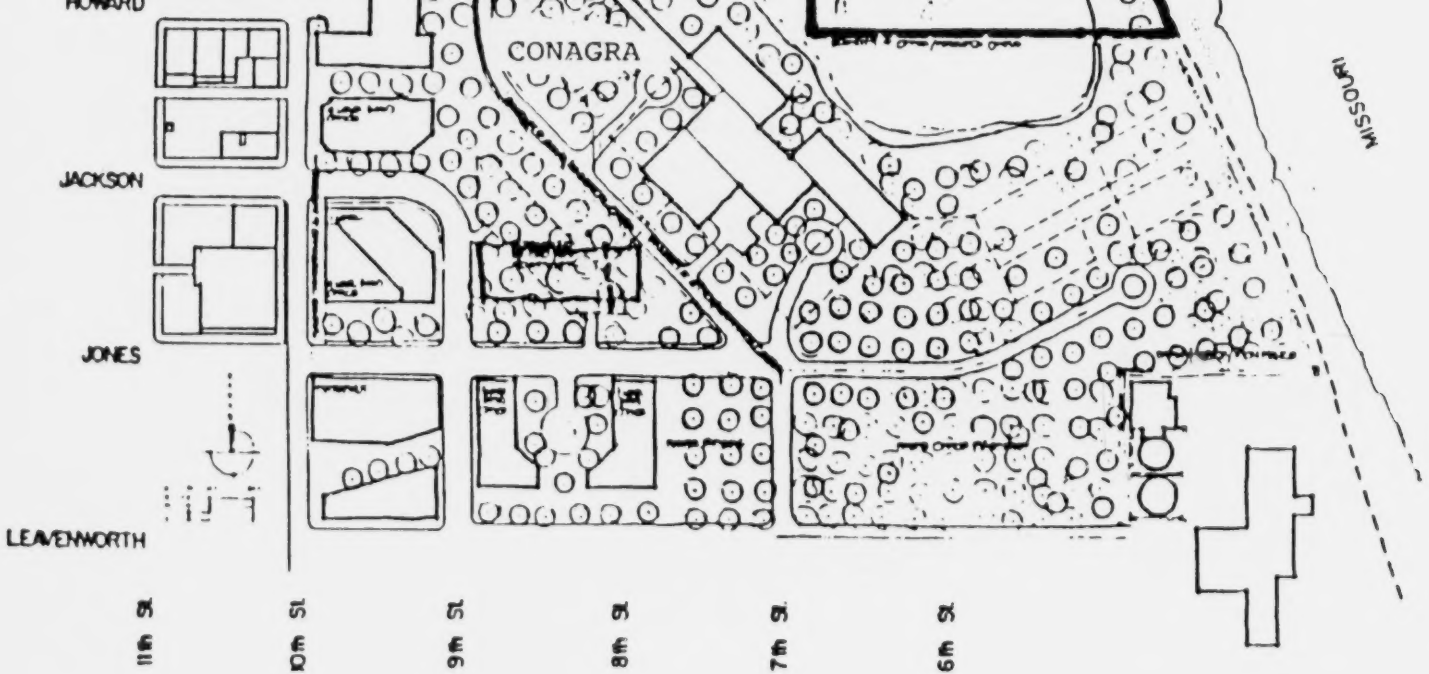
County Park
Boundary
PARK
RIVER



Site Plan

Figure 6

from RIVERFRONT REDEVELOPMENT PLAN presented to
OMAHA CITY COUNCIL on 2/2/'88, Exhibit 201

The agreement reached by ConAgra, City of Omaha, Douglas County, and ODF (Exhibit 202) bound the parties to bring off this integrated transformation. From a study of these renderings, the following relationships affecting Federal concerns appear and are indisputable for the purposes of this case:

(a) Three blocks of Jobbers Canyon Historic District were to be demolished for a road to service ConAgra, a fourth block for campus space.

(b) Side Hill Lead travels one block south of Jobbers Canyon, and would take UPRR's train a day to and from Council Bluffs right through ConAgra's private campus and over the lake if provisions could not be made to run the train along the floodwall line and let UPRR abandon Side Hill Lead and lease Burlington Northern tracks to get to and use the Burlington Northern floodwall line. The abandonment and shared line agreement are subject to ICC approval.

(c) The new Riverfront park concept had a host of deviations from the park as portrayed in soliciting National Park Service funding in 1978 and as planned and partially paid for by NPS funds in 1983. The more important changes were that Jobbers Canyon will be destroyed not complemented by the park, and the former idea of ready access from several directions (6th, 7th, 8th, Howard and Harney Streets), and the ability of park users to traverse the entire lake shore is cut off by ConAgra's making most of the west and south shore its own private property and cutting off access from 6th, 7th, 8th, Howard and Harney Street. These changes and other problems gave the National Park

Service approval power over the new proposed Riverfront Park. If the National Park Service denied these changes allowing ConAgra its privacy at the expense of public access, the project would not go forward short of ConAgra relenting on those matters.

(d) The floodwall built by and overseen by the Corps of Engineers protects from flood most of the 113 acre tract. It operates in conjunction with a sewer and pump system that cannot be changed without approval by the District Engineer. Pressurized sewers under Farnam Street would have to be removed and pressurized sewers under Jones Street would be modified. A number of sewers would be removed under the lake. Without Corps approval, the park could not be built nor could the sewer requirements of ConAgra's campus be met. Without these approvals, the project would literally have to put up with a smelly park, smelly office buildings, and no flood protection.

The federal agencies in this case had the foregoing significant federal interest (flood control, park usage, and rail traffic) to watch out for and had approval powers that went to critical aspects of the project: ConAgra's need for privacy, the developers' need for getting rail traffic out of sight and off to the east side, and the removal of existing sewers and restoration of their function by new sewers so the park and offices would not smell and would still have flood protection. This suit was made necessary because the National Park Service, the

Corps of Engineers, and Interstate Commerce Commission did not and have not exercised their approval authority and in so doing follow NHPA and NEPA.

5. Implementation of the Agreement and Federal Inaction.

In July, 1988, Union Pacific Railroad abandoned Side Hill Lead and entered a joint use agreement with Burlington Northern so that their train a day each way skirts along the floodwall, to be hidden from public view by a berm. The Interstate Commerce Commission approved nothing and insisted in this lawsuit that it had nothing to approve. The Farnam Street pressure sewer has been removed and other sewers removed and/or modified. The District Engineer approved nothing and insisted in this lawsuit that he had nothing to approve. The 1983 plan for the park as a high access people park complementing Jobbers Canyon is changed. Jobbers Canyon is gone. The National Park Service has approved nothing and insists in this lawsuit it had nothing to approve.

The National Park Service and the Department of the Interior have jurisdiction over the Riverfront Redevelopment Plan and Agreement because Douglas County acquired and planned the park now being developed under the Redevelopment Agreement in part with a federal grant of $750,000.00 received from the Land and Water Conservation Fund in 1978. See *Friends of the Shawangunks, Inc. v. Clark, Inc.*, 754 F.2d 446 (2d Cir. 1985). The Army Corps of Engineers has jurisdiction over the Riverfront Redevelopment Plan because the project requires a number of significant modifications to features of the

flood protection system, including the relocation, rerouting, and removal of sewer lines, requiring the Corps' approval under 33 CFR § 208.10(5). See *U.S. v. City of Irving*, 482 F.Supp. 393, 395 (N.D. Tex. 1979). The Interstate Commerce Commission has jurisdiction over the project because of the abandonment of a railroad line known as the "Side Hill Lead" and a joint use agreement between Burlington Northern Railroad and the Union Pacific Railroad rerouting rail traffic to a rail corridor along the Missouri River floodwall. 49 USC §§ 10903(a) and 11343(a)(6).

REASONS FOR GRANTING THE WRIT

The petitioner asserts there are three compelling reasons for granting this writ:

(1) The decision of the Eighth Circuit to the effect that there was not sufficient federal involvement in the Riverfront Redevelopment Plan by the Corps of Engineers, the National Park Service, and the Interstate Commerce Commission to trigger NHPA and NEPA compliance puts it in conflict with decisions of other Courts of Appeal.

(2) This Court has not but should answer, address, analyze and set the standards on the important issue of when a federal regulator ought implement NEPA and NHPA when its routine approval actions are to be exercised over essentially non federal projects.

(3) This decision of the Eighth Circuit confining federal regulator's consideration of impacts only to those

on the very site of the regulator's concern conflict with other Circuits and this Court's precedent requiring indirect and off site impacts be considered by federal regulators.

What is enough federal involvement to trigger NEPA and NHPA?

NEPA procedures, ranging from findings of no impact to the elaborate environmental impact statement are triggered by "major federal action." [42 USC 4332(2)(C)]. The NHPA protective device, the 106 evaluation and comment process (36 CFR 800, et seq.), are triggered by agency "undertakings." (16 USC 470(f))

With this decision the Eighth Circuit retreats from the tests developed by the Circuits on when the federal regulator reviewing a non federal project has the right and duty to implement NEPA and NHPA processes.

This decision has placed the Eighth Circuit at odds with the principle that generally but not absolutely non federal projects are considered federal actions for NEPA and NHPA purposes if they cannot "begin or continue without prior approval of a federal agency." *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988); *Maryland Conservation Council, Inc., v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 155 (DC Cir. 1985); *Binderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 277, 280 (3rd Cir. 1983); and *WATCH v. Harris*, 603 F.2d 310, 319-26 (2d Cir. 1979).

The Circuits and the federal agencies need this Court's articulation of standards and tests to apply in determining when the federal agency should comply with NEPA and NHPA in exercising federal approval power over essentially non-federal projects. This case is perfect for such an evaluation by this Court.

The "yes or no", "go or no go" test is not one the courts can apply absolutely for fear of a regulator with the most trivial federal interest stopping a worthy non federal project in the face of tenuous environmental or historic damage. Unfortunately, the corollary of that is the more frequent and tragic story of a timid regulator not exercising agency authority while a historic or environmental treasure is lost.

The Eighth Circuit refused to accept the position that Corps of Engineers jurisdiction of a single mile of a 70-mile private power line formed a basis for stopping the project. *Winnebago v. Ray*, 621 F.2d 269 (8th Cir.). Federal regulators probably should not be mere stumbling blocks. The problem of weighing intensity of federal interest in a non federal project frequently arises and explains the results of a number of cases where the courts found NEPA and NHPA not triggered. See, e.g., *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987); *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, (9th Cir. 1989); *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976).

What ought trigger NEPA and NHPA? The agencies charged with protection of the environment and historic treasures are of the "go or no go", the "hair trigger" school. See Advisory Council on Historic Preservation, 36 CFR 800.2(c) & (o) and the Council on Environmental

Quality, 40 CFR 1508.8, 1508.18, & 1508.27. These agencies, like the *Hodel* Court expect a catlike vigilance of the regulator or bureaucrat.

The Eighth Circuit with this case and its earlier *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) reject a hair trigger for NEPA and NHPA and opt for the unworkable, subjective, and unlawfully restrictive test "whether the overall federal involvement with the project is sufficient to turn an essentially private action into federal action." *Ringsred* at 828 F.2d 1305; this case, App., pp. 90-91. That test is no hair trigger. It is a double safety encouraging the regulator to keep his pistol in a locked drawer and avert his eyes while gray hordes of neo-Visigoths descend on historic, aesthetic, and environmental treasures, cannons cocked and aimed at unarmed local skirmishers ringing the treasure in Vain defense.

This case, with three federal agencies showing quantifiable degrees of legitimate agency business concern in the non federal project and having identifiable yes/no power over aspects critical to the project (need to reroute railroads, approve changes to the park to accommodate ConAgra's desire for privacy, and remove or change sewers to avoid smelly park and offices), is the perfect case to frame the standards for when the federal agency ought to apply NEPA and NHPA to non federal projects: a hair trigger, a double safety, or somewhere between.

The agency must consider indirect off-site impacts.

The Circuit sustained the erroneous analysis of Magistrate Kopf (Appendix 68-71) and concurred in by the District Court that because Jobbers Canyon was not in the

park, atop the Side Hill Lead, nor over pressure sewers (some non pressure tributaries entered Jobbers Canyon), no agency control existed in the matter of Jobbers Canyon. That conflicts with well settled principles of this Court recently repeated at *Robertson v. Methou Valley Citizens Council,* 109 S.Ct. 1835 (1988), and *Marsh v. Oregon Natural Resources Council,* 109 S.Ct. 1851 (1989).

The Circuit Court's opinion is fundamentally in conflict with the *Robertson* opinion. Like the Redevelopment Project at issue in this case, *Robertson* involved a *private* development, namely, a proposed ski resort, which required a permit from the U.S. Forest Service. The off-site impacts in *Robertson* involved the degradation of air quality and wildlife habitat by private land development that was expected to occur in the vicinity of the ski resort. This private development would affect air pollution by generating increased auto traffic and wood burning for stoves and fireplaces.

In deciding whether to grant the permit, the Supreme Court held that the federal agency in the *Robertson* case was required not only to consider the off-site impacts of the ski resort, but also to identify and describe mitigation measures for those impacts, even though the agency had little or no "control" over the implementation of these mitigation measures, since the proposed options were primarily measures that might be taken by state and local government agencies. *Id.* at 1841, 1843.

The Supreme Court left no doubt about the federal agency's mandatory obligation to identify and discuss these mitigation measures in detail, even though the agency did not have "jurisdiction" over the area in which

the impacts would occur and the agency could not guarantee that the mitigation measures would be adopted by the third parties. *Id.* at 1846.

> [W]here the adverse effects . . . are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.

Id. See also *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 90 (1983). ("environmental impact . . . includes the effects of off-site activities").

The Circuit's opinion is so at odds on this issue with the orthodox position of this Court and all Circuits that this Court ought correct this glaring error by issuing the Writ.

The case is not moot.

Petitioner and its able ally below, National Trust For Historic Preservation, were faced with attempting to stop the largest single destruction of historic properties in the history of the National Register of Historic Sites. Three efforts at stays in the District Court failed. Demolition of the Canyon proceeded along with the case. The Circuit stayed the demolition of five of the remaining buildings from March 1, 1989, to June 9, 1989, then lifted the stay three months prior to rendering its September opinion. By the time of the September, 1989, opinion of the Court, *every remaining* Canyon building was gone or almost gone. Now nothing remains.

The *only* portion of the Eighth Circuit's opinion not in error was its determination the case was not moot. This Court should take the same position. Demolition of a historic or environmental treasure does not moot a case. NEPA and NHPA reviews frequently occur where costly historic or environmental damage is inevitable. In such cases, emphasis is directed toward mitigation. In this case, mitigation can include many concepts to include but not be limited to (1) professional gathering of historical and architectural data and photographs to historicise and document in detail Jobbers Canyon, its architecture and history for posterity; (2) discuss and consider mitigation of effects on the nearby Old Market Historic District; (3) consider opening foot path access across ConAgra to the park from 6th, 7th, 8th, Harney and Howard Streets and create public foot paths around the west and south shore ConAgra took from the public for its privacy needs. Any NEPA or NHPA process conducted now can be as exhaustive and helpful as if conducted when Jobbers Canyon still stood, but its inevitable loss was reluctantly accepted by an agency reviewer.

CONCLUSION

Historic properties are lost in this country to the developers' wrecking ball while federal agencies with a duty to act sit passively. This Court needs for the sake of historic preservation in America to address the standards and guidelines for the federal agency to implement NHPA and NEPA when the agency is confronted by a non federal project over which the agency has a legitimate agency business concern. This case provides the perfect

vehicle for that examination. The petitioner asks this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit in this matter.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, ("PROUD"), et al.,	) CV 88-0-247
Plaintiffs,	)
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES,	) MAGISTRATE'S) FINDINGS AND) RECOMMENDA-) TIONS
Intervenor,	)
vs.	) (Filed JUL 28 1988)
INTERSTATE COMMERCE COMMISSION, et al.,	)
Defendants.	)

This case is presented to me in my capacity as a magistrate as well as in my capacity as a court-appointed master (filing 108). Oral argument, a four-day trial on two issues, and numerous briefs have been considered. I conducted the pretrial and trial proceedings, and I make these findings and recommendations as a magistrate, except to the extent required by my appointment as a master. The following findings and recommendations are considered by me to constitute findings of fact or conclusions of law interchangeably.

I.

A.

People for Responsible Urban Development ("Proud"), Mercer Management Company ("Mecer"), and Roger Durand, collectively referred to as plaintiffs, filed

this case on March 25, 1988 (filings 1, 30). The plaintiffs wanted to stop the demolition of a part of downtown Omaha, Nebraska referred to as "Jobbers Canyon." Jobbers Canyon consists of about six and one-quarter square blocks and includes a number of large-scale, primarily early twentieth century warehouses, structures evidently having historic significance. Jobbers Canyon is listed on the National Register of Historic Places ("National Register"), 16 U.S.C. § 470a, by nomination of the City of Omaha, Nebraska on December 4, 1986. (Exhibits 284, 285, 286).

The plaintiffs sued various federal defendants, including the Interstate Commerce Commission ("ICC"), the National Park Service ("Park Service"), and the Army Corp of Engineers ("Corps"), collectively referred to as the federal defendants. The plaintiffs also sued the City of Omaha ("City"), the County of Douglas, Nebraska ("County"), the Omaha Development Foundations ("ODF"), and ConAgra, Inc., collectively referred to as the nonfederal defendants. On April 13, 1988, Judge Urbom denied the plaintiffs' request for a temporary restraining order and preliminary injunction (filing 25).

On April 28, 1988, the National Trust for Historic Preservation in the United States ("Trust") requested leave to intervene (filing 32), asserting a position similar to that of the plaintiffs (Intervenor's Complaint, filing 32, attachment). This request was granted on May 20, 1988 (filing 98). The Trust should not be confused with the Advisory Council on Historic Preservation ("Advisory Council"); the Trust is a corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare* 16 U.S.C. § 468 *with* 16 U.S.C.

§ 470i. The Advisory Council did not attempt to become a party to this litigation.

B.

About the time that Judge Urbom denied the motion for temporary restraining order and preliminary injunction, demolition of Jobbers Canyon began. The land and buildings comprising Jobbers Canyon are under the control of or are owned by the ODF, (Exhibit 202; Vol. I, TR 91:8-92:9), a private nonprofit corporation (Vol. I, TR 84:9-18). The demolition of Jobbers Canyon is a part of the implementation of a significant effort by the nonfederal defendants to revitalize downtown Omaha by, among other things, constructing a corporate office "campus" to be used by ConAgra, and developing the presently undeveloped, but dedicated, county-owned park, known as "Central Park East." This proposed revitalization is generally described in the so-called "River Redevelopment Plan" ("Redevelopment Plan"), (Exhibit 201), and exhaustively detailed in the "Redevelopment Agreement," (Exhibit 202). The Redevelopment Agreement was signed by all nonfederal defendants and became effective about May 3, 1988. The Agreement is not signed by the federal defendants. (Exhibit 202).

From a plain reading of the Redevelopment Agreement, and from listening to all the testimony and reading all relevant exhibits, the redevelopment project *does not intentionally or explicitly*: (a) call for use of federal financial aid to implement the redevelopment, except to the

extent that the use of Central Park East could be characterized as using federal funds, which funds were expended prior to the redevelopment project; or, (b) call for the issuance of any federal licenses, permits, or approvals, except to the extent that federal licenses, permits or approvals, if subsequently required, are required as an unintended and incidental consequence of some part of the redevelopment. As stated by the nonfederal defendants in their brief, "the parties to the Riverfront Redevelopment Agreement have desired from the outset to design and implement a project totally local in character and absent federal assistance or involvement." Trial Brief of Non-Federal Defendants at 34.

Jobbers Canyon is generally bounded by 8th Street, 10th Street, Farnam Street, and Jackson Street (Exhibit 201, p.3 and fig. 5). One building in the Canyon is not being demolished, but rather is being developed (Exhibit 284 (map on last page); Vol I TR: 180:4-181:13). ODF requires no federal approvals to demolish the Canyon, and has not and will not seek any federal assistance regarding the Canyon. (Exhibit 106). Central Park East is located to the east of Jobbers Canyon, and, when developed, will generally be described as having boundaries extending east, from the present terminus of the Central Park Mall (a previously developed park/mall not to be confused with Central Park East) at Eighth Street to the Burlington Northern riverfront line, and from the north, bounded by the I-480 bridge, to the south, corresponding approximately with the extended south right-of-way line of Howard Street. (Exhibit 201, p. 12, figs. 5 and 6). Exhibit 1026 depicts the park concept. The ConAgra campus will not be located in Central Park East, but will

generally be located to the south and west of the park. (Exhibit 201, pp. 12-13, figs. 4, 5, and 6; Exhibit 202, attached exhibit 4). The park will remain a public park. (Exhibit 202). Additionally, Central Park East is not located on land where Jobbers Canyon sits.

Central Park East started in 1978 when the State of Nebraska, through the Game and Parks Commission, acting at the request of, and essentially for, the county, submitted an application, (Exhibit 217, pp. 1-6; Exhibit 221), to what is now known as the Park Service for federal funds to acquire and develop park property under the Land and Water Conservation Fund Act ("LWCFA"). 16 U.S.C. § 460*l*-1-8. Subsequently, the application was granted on June 16, 1978, and a contract was entered into by and between the State of Nebraska and the predecessor to the Park Service. (Exhibit 217, pp. 1-6).

Prior to the 1978 agreement being entered into, the predecessor of the Park Service issued a "negative declaration," indicating that the project – to acquire and develop Central Park East – would not significantly affect the quality of the environment within the meaning of National Environmental Policy Act ("NEPA"). (Exhibit 217, p. 35). After the negative declaration was issued, the State Historic Preservation Office advised by letter on May 30, 1978, that the project had been reviewed by that office and the project would have no effect upon properties enrolled in or eligible for inclusion on the National Register. (Exhibit 217, p. 26). Jobbers Canyon was considered in this 1978 review. (Vol. IV, TR: 800:1-4).

The original agreement was divided into two stages; stage 1 was for acquisition, and stage 2 was for development. (Exhibit 217, pp. 1-6). The application was amended six times, (Exhibits 217A, 217B, 217C, 217D, 217E and 217F), and the last amendment, dated February 6, 1986, deleted stage II. (Exhibit 217F). The county acquired the land, about 14.3 acres, with $750,000 from the LWCFA grant and other sources, and the project was "closed out" on February 19, 1986 by the Midwest Regional Office of the Park Service, indicating that the project was complete. (Exhibit 232).

The concept of Central Park East used in the instant redevelopment project includes the acquisition of additional land, without use of federal funds, and development of the park, including the creation of a lake, without federal funds. (Exhibit 202, section 4; Exhibit 1026). The Central Park East development contemplates a park where "passive" recreation will take place. (Exhibit 202, attached exhibit 4).

The area to be redeveloped includes old railroad trackage. Relocation of one Union Pacific industrial track, the "side hill lead," will be required. (Exhibit 201, pp. 7-8, 21, fig. 4; vol. II, TR 469:19-470:10; 472:1-473:16). This trackage is not located upon land where Jobbers Canyon sits.

On the easterly edge of the area to be redeveloped is the Missouri River, and adjacent to the river, on the Omaha side, is a levee system providing flood protection. (Vol IV, TR 940:25-941:3). The ground upon which the levee is situated is owned by the city, but the levee is supervised by the Corps (Vol. IV, TR 986:5-13;

940:25-941:3), pursuant to a quite detailed operations and maintenance manual, (Exhibit 293). The levee is not located upon land where Jobbers Canyon sits.

C.

(1)

Since the demolition of Jobbers Canyon threatened to make this litigation moot, the parties were placed on an expedited discovery schedule and trial on two limited issues was scheduled to commence on July 11, 1988. (filing 104). The two issues for trial were:

1. whether, based upon the existing Riverfront Redevelopment Agreement, including all approved plans, specifications and construction drawings as of the date of trial, there is any federal funding, federal licensing or other federal involvement requiring a section 106 hearing under the National Historic Preservation Act ("NHPA") or otherwise implicating the National Environmental Policy Act ("NEPA") or the Land and Water Conservation Fund Act ("LWCFA"); and

2. if the answer to the foregoing question is in the affirmative, whether a section 106, 16 U.S.C. § 470f, hearing (or other action required under the NHPA, the NEPA or the LWCFA) could result in a federally required retention of one or more buildings in Jobbers Canyon. (Filing 104).

These findings and recommendations do not attempt to resolve the merits of other issues.

(2)

There are three federal statutory schemes, together with related regulations, that must be considered: the NHPA, the NEPA, and the LWCFA.

(a)

Section 106 of the NHPA, 16 U.S.C. § 470f, attempts to afford the Advisory Council the opportunity to comment on federal undertakings which might impact upon historic properties:

> The head of any federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.

The term "undertaking" is defined by 36 C.F.R. § 800.2(o), which provides:

> "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or

> programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.2(o) (1987).

(b)

Section 102(2)(C) of the NEPA, 42 U.S.C. § 4332(2)(C), requires that when any project involves a "major Federal [action] significantly affecting the quality of the human environment," an environmental impact statement must be prepared:

> [A]ll agencies of the Federal Government shall –
>
> . . . .
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

42 U.S.C. § 4332.

(c)

Section 6(f)(3) of the LWCFA, 16 U.S.C. § 460*l*-8(f)(3), provides that "[n]o property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses." 16 U.S.C. § 460*l*-8(f)(3). The purpose of this provision is to insure that the land will be continually maintained in public recreation use, unless substitute property is provided. 36 CFR § 59.3(a) (1987).

(3)

Essentially, the plaintiffs and the intervenor claim that the project substantially involves three federal defendants: the ICC, the Corps, and the Park Service. (filing 248). The arguments of the plaintiffs and the intervenor are set forth below.

(a)

With regard to the ICC, the plaintiffs and the intervenor claim that the ICC must approve the "abandonment" of the "side hill lead," and the change in routing of traffic generally occasioned by the redevelopment (filing 248). Accordingly, it is argued that the ICC's decision to

approve or disapprove the change constitutes both a federal "undertaking" for NHPA purposes and "major Federal" action for NEPA purposes. Thus, since the ICC has not acted to approve or disapprove the change, it is claimed that all of the parties need be restrained until the ICC makes a decision, which decision will necessarily, so it is claimed, require a consultation with the Advisory Council pursuant to the NHPA and an environmental impact statement in accordance with the NEPA.

(b)

With regard to the Corps, the plaintiffs and intervenor claim that the redevelopment will require the excavation of a lake close to the Missouri river levee, the construction of a pedestrian overpass over the levee, and a change in the sewer system intersecting the levee (filing 248). Accordingly, it is argued that the Corps' decision approving or disapproving the proposed works constitutes both a federal "undertaking" for NHPA purposes and "major Federal" action for NEPA purposes. Thus, since the Corps has not acted to approve or disapprove the proposed works, it is claimed that all of the parties must be restrained until the Corps makes a decision, which decision will necessarily, so it is claimed, require consultation with the Advisory Council pursuant to the NHPA and an environmental impact statement in accordance with the NEPA.

(c)

The most extensive arguments are made with regard to the Park Service. (filing 248). These arguments are

intricate, and as best as I understand them, they are as follows.

First, under the LWCFA, assuming that the Central Park East project was properly closed as merely an acquisition project, and not also as a development project, the LWCFA grants manual requires a section 106 consultation with the Advisory Council before moving on to development of the park. The defendants should therefore be restrained until the consultation takes place and an environmental impact statement is issued.

Second, even if the pertinent portion of the LWCFA grants manual does not apply, the last amendment to the Central Park East agreement incorporated the original contract by reference. The original contract required that all development plans be submitted for approval to the Park Service prior to development. The defendants should, therefore, be restrained until such approval is given, which approval will necessarily require a section 106 consultation and the issuance of an environmental impact statement.

Third, the Park Service improperly closed out the LWCFA project regarding Central Park East in 1986 before the establishment of so-called "6(f)(3) boundaries" were set. (Section 6(f)(3) refers to section 6(f)(3) of the LWCFA.) Absent the setting of 6(f)(3) boundaries, the 1978 Central Park East Project is open, the Park Service must require the setting of 6(f)(3) boundaries, and not having done so, it must proceed to do so. When it proceeds to do so, the Park Service will be required to engage in a section 106 consultation and must issue an environmental impact statement. The defendants should

therefore be restrained until the section 106 consultation has occurred and the environmental impact statement issued.

Fourth, any future change in an LWCFA-assisted project which calls into question the original plans retroactively calls into question the basis of the original funding requiring the Secretary of the Interior to investigate whether the change contravenes the purpose of the original funding. Since the redevelopment involves the destruction of Jobbers Canyon rather than use as a residential neighborhood, since the park will be radically redesigned to serve as a front lawn for ConAgra, and since public access to the park will be limited, the Park Service must investigate because these changes contravene the original basis for the federal grant. If the Park Service must investigate, when it proceeds to do so, the Park Service will be required to engage in a section 106 consultation and must issue an environmental impact statement; accordingly, the defendants should be restrained until these acts occur.

Fifth, in two ways the county has relinquished control over Central Park East. On the one hand, the county has engaged in a complex financing scheme to develop the park whereby a private corporation will have control over the park, and thus no assurance can be given that the park might not be converted into a nonpublic use. On the other hand, the authority of the so-called architectural review committee provided for in the Redevelopment Agreement provides for the relinquishment of the county's control over the park. In essence, the park has been converted in violation of the purpose of the original grant, and pursuant to the LWCFA, the Park Service must

act to protect its interests under the LWCFA; when it acts, the action will of necessity require a section 106 consultation and an environmental impact statement. Therefore, it is argued, the defendants should be restrained until these acts occur.

II.

A.

The only parties to this litigation with no apparent personal or institutional bias or motive for any of their actions are the federal defendants. Clearly, the nonfederal defendants have an "economic bias" motivating them to redevelop downtown Omaha, and to intentionally avoid any federal involvement, presumably so they will not be confronted with some federal agency second-guessing their policy decision to demolish Jobbers Canyon. The plaintiffs and the intervenor have an "aesthetic bias" to preserve the Canyon, to disagree with the policy choice of the nonfederal defendants to demolish Jobbers Canyon, and to look for the slightest hint of federal involvement, hoping that a federal agency may be able to alter the policy choice of the nonfederal defendants. The federal defendants have no bias or motive that I can find which would detract from their objectivity in viewing the facts and applying the facts to the statutes and regulations particularly within their jurisdiction in an objective manner.

The federal defendants, by reference to the statutes and the regulations they administer, have taken the position that, among other things, there is no substantial federal involvement in the redevelopment generally, and

no federal involvement at all with the Canyon. Accordingly, because I find no bias or motive which causes me to believe that the federal defendants have acted other than objectively, it is appropriate here to give deference to an agency's interpretation of a statute which it administers, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), to follow the construction of the statute by those charged with its execution, unless there is compelling reason to believe that the construction is wrong, *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977), and to follow the construction by an agency of its own regulations unless that construction is unreasonable or inconsistent with the regulations. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). I have therefore approached the facts with these principles in mind.

B.

At the core of this case is the question of how one determines whether the activities of essentially private developers implicates a federal interest sufficiently enough to trigger the provisions of the NHPA and the NEPA. I have especially considered six cases, all of which were brought to my attention by the parties. I shall summarize the holdings of these cases, and refer to them in relation to the facts of this case later in these findings and recommendations. The first three cases discussed are relied upon by the defendants, and last three cases are relied upon by the plaintiffs.

(1)

(a)

The first case relied upon by the defendants is *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), in which Judge John R. Gibson authored the opinion. The facts of *Ringsred* are as follows. An Indian tribe and the City of Duluth created a development commission, the purpose of which was to develop a gaming facility in a former "Sears Building." The tribe bought the building and conveyed title in turn to the United States to hold the land in trust for the tribe. After the tribe fixed up the building, it caused the building to be leased to the commission. The leasing arrangement was approved by the United States, since it held the property in trust for the tribe. In exchange for the tribe's agreement to fix up the Sears building, which contract was approved by the government, the City agreed to build a parking ramp next door that would be leased to the commission. The parking ramp land was not situated on land owned by the tribe which was being held in trust by the government. *Id.* at 1306. For the United States, the Secretary of the Interior issued a negative environmental assessment (not an environmental impact statement), stating that the gaming facility would not have a significant environmental impact. The Secretary did not consider the impact of the parking ramp in the environmental assessment. *Id.* at 1307.

Ringsred brought suit. He wanted declaratory relief and an injunction prohibiting the construction of the parking ramp. Ringsred contended, among other things, that the United States had not properly considered the

NHPA and the NEPA. The court thus had to determine whether the proposed parking ramp was itself part of a major federal action, for, if it was, the parking ramp should have been considered by the Secretary. *See id.* Judge Gibson employed two tests.

First, Judge Gibson asked whether the parking ramp could be built without any federal legal action taking place. *Id.* at 1308. In other words, the Judge looked to determine whether, independent of the gaming facility, the City of Duluth could have built the ramp without federal permission or assistance. He found that "[n]o federal action is a *legal* condition precedent to the construction of the parking ramp." *Id.* (emphasis added) (citation omitted). *See Winnebago Tribe v. Ray*, 621 F.2d 269, 272-73 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980) (upholding the Corps' decision not to prepare an environmental impact statement for the entire electric transmission line project because the corps lacked sufficient control and responsibility over the entire project to properly evaluate the project). Or, stated otherwise, the city could have condemned the property for the building ramp without federal assistance or license. *Id.*

Second, Judge Gibson then looked to determine whether factually there was any connection between the parking ramp and the gaming facility. Here, the Judge found that the Secretary had a "factual veto," since, as a practical matter the government had to consent to the lease of, and rehabilitation contract for, the gaming facility before the City would build the ramp. It was concluded, however, that this "factual veto" was not sufficient to significantly involve the federal government. The court applied three tests to determine the significance or lack

thereof of the federal involvement: the degree of discretion exercised by the agency over the federal portion of the project, the gaming facility; whether the federal government had given any direct financial aid to the project; and, finally, whether the overall federal involvement with the project was sufficient to turn essentially private action into federal action. *Ringsred*, 828 F.2d at 1308 (quoting *Winnebago Tribe*, 621 F.2d at 272 (citation omitted)).

Finally, Judge Gibson concluded that the NEPA was not implicated because " '[a] private act does not become a federal act, albeit a "major" one, merely because of some incidental federal involvement.' " *Id.* (quoting *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 644 n.9 (5th Cir. 1983)). Insofar as the NHPA was concerned, the court concluded that since there was a lack of significant federal involvement for *NEPA* purposes, the project was not an "undertaking" for *NHPA* purposes. *Id.* at 1309.

(b)

The second case relied upon by the defendants is *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976). In *Edwards*, the district court enjoined a bank from demolishing its privately owned building, which building had, without its consent, been located in a historic district listed in the National Register. The bank wanted to build a new bank building on the underlying land, and would, as a matter of necessity, be required to obtain the permission of its federal regulator for authority to move into the new building. *Id.* at 1243.

On appeal, the Seventh Circuit Court of Appeals first recognized that the scope of the NHPA is no broader than

that of the NEPA. *Id.* at 1245 n.2. The court then stated that the basic jurisdictional question was not whether NEPA or NHPA might under some circumstances apply to the structure, but rather "whether the substantive provisions of these Acts may be applied to enjoin purely private activities which require no participation by any agency of the federal government." *Id.* at 1245.

The court then considered the nature of the "undertaking" that was being questioned. The court found that the undertaking was not the license being sought from the federal regulator, which was not named a party, but rather that "the Bank's *undertaking* or project" was the demolition of the structure. *Id.* The court then looked to determine whether the undertaking was federally funded or assisted, and, finding that it was not, concluded that " '[w]ithout such federal funds, the project remains local in nature.' " *Id.* (footnote omitted) (quoting *Ely v. Velde*, 363 F.Supp. 277, 285 (E.D. Va. 1973), *rev'd*, 497 F.2d 252 (4th Cir. 1974)). The court further observed, looking at the regulations and statutes administered by the federal regulator, that there was nothing to indicate that the regulator had authority to regulate demolition of a private building. As a consequence, the Seventh Circuit reversed the decision of the lower court. *Id.* at 1246.

(c)

In a single-judge opinion denying an application for an injunction pending appeal, Judge Sobeloff of the Fourth Circuit Court of Appeals was confronted with a claim of "preservationists" seeking to stop the demolition by the owner of an old railroad station listed on the

National Register. *Miltenberger v. Chesapeake & Ohio Ry.*, 450 F.2d. 971, 972 (4th Cir. 1971). In reviewing the reach of the NHPA and the NEPA, the judge found that the station had been abandoned by the railroad as a station, and was thus not subject to the jurisdiction of the National Railroad Passenger Corporation ("AMTRAK"). *Id.* at 974. Even assuming that AMTRAK had jurisdiction to stop the demolition, the court found that AMTRAK was essentially a private corporation, and the fact that AMTRAK received federal funds did not make it a federal agency for NEPA or NHPA purposes, since such indirect federal financial assistance would have the unintended impact of making any "private corporation subject to governmental aid . . . [a] 'federal agency.' " *Id.*

(2)

(a)

A principal case relied upon by the plaintiffs and the intervenor is *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446 (2d Cir. 1985). In *Friends*, the Second Circuit Court of Appeals was faced with a suit brought by an environmental group challenging the proposed construction of a golf course on land for which the government had provided funds pursuant to the LWCFA for the acquisition of a "conservation" easement. The public had no access to the land underlying the original easement, inasmuch as such land was owned in fee by private individuals. The fee owner, however, was prohibited from developing the property beyond the uses existing at the time, which included a then-existing nonoperating golf course and pro shop. A hotel chain desired to develop the land, and

sought to have the easement amended. Among other things, the amended easement would have allowed the construction of a golf course and would have made much of the land available to the public for the first time. *Id.* at 448. The regional director of the Park Service concluded that no conversion took place by the amendment to the easement and therefore that no federal approval was required. Suit was commenced, and the district court held that the amendment to the conservation easement was nothing less than a bonus to the public, and did not constitute a conversion. *Id.* at 449.

The circuit court reversed. The Court first found that a conversion had taken place, requiring federal approval, *id.* at 451, because the conservation easement was intended to "prevent further development of the land underlying the easement." *Id.* at 450. By the amendment, the local authorities would be conveying away their right to control development and thus conversion of the easement would take place. *Id.* at 451. Moreover, the court found that even if a conversion would not take place, since the change in the easement significantly altered the original utility of the easement – control of future development – the basis for the original funding was called into question, and federal government approval was required. *Id.* at 452.

(b)

The second principal case relied upon by the plaintiffs and the intervenor is *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983). In that

case, in 1968 the Secretary of Housing and Urban Development ("HUD") approved an urban renewal plan submitted by the Town of Dover. As a part of the plan, the Old Stone Academy was slated for demolition. In 1969, HUD and the Town of Dover signed a loan and capital grant contract to provide the funds necessary to carry out the urban renewal plan. As a part of the plan, the Town of Dover Redevelopment Authority ("TDRA") a corporate body created by the Town of Dover acquired the Academy in December of 1978. On July 7, 1980 the TDRA voted to demolish the academy. The loan from HUD to the Town was closed out on April 16, 1982.

The Academy was listed on the National Register on May 21, 1982, but the court found that it was eligible for inclusion as early as 1976. Since Congress amended NHPA in 1976 so as to require federal agencies to consider not only listed historical sites, but also sites eligible for listing, the district court concluded that HUD had ongoing jurisdiction, by virtue of the unclosed loan, from 1976 to 1980, the latter being the last year when the Town submitted data to HUD in the form of reports, to consider the impact of the demolition of the Academy and should have consulted under section 106 with the Advisory Council. *Id.* at 281-82. (The lower court also addressed NEPA issues, and came to a similar conclusion based upon similar reasoning insofar as NEPA was concerned. *Id.* at 278.)

The circuit court essentially adopted the reasoning of the lower court and held that under both the NHPA and the NEPA that these statutory schemes are applicable to federal agencies as long as a federal agency has authority during the undertaking to alter the impacts on historic

properties or the environment. *Id.* at 278, 282. Thus, the court reasoned that the NHPA or NEPA responsibilities of federal agencies exist, not only at the time of the initial grant decision, but during any time the federal agency has continuing authority over the project. *Id.* Thus, HUD was obligated to comply with the NHPA and the NEPA, and the district court's injunction was affirmed. *Id.* at 282.

(c)

The next case principally relied upon by the plaintiffs and the intervenor is *Fill the Pool Committee v. Village of Johnson City*, No. 82-CV-762 (HGM) (S.D.N.Y. Aug. 19, 1982) (memorandum-decision and order granting a preliminary injunction), an unpublished opinion. In that case, in which the Park Service was not a defendant, on July 20, 1982 the Village of Johnson began to demolish a pool which was eligible for listing in the National Register. Although the pool had been built in 1927, the Village had acquired monies under the LWCFA in 1968 to acquire the park and pool situated in the park. After the 1968 acquisition, the pool fell into a state of disrepair, and, the pool was closed. As time went on, the village was confronted with a threat by its insurer to cancel insurance unless the pool was either destroyed or the the pool was secured from vandals and from the possibility of falling building materials. The village then commenced demolition.

The district court, among other things, found that the contract which the village signed when it obtained the LWCFA monies prohibited conversion. Accordingly, even though the grant was long closed, the village would be

enjoined until the village could show compliance with with the NHPA. In order to show compliance with the NHPA, the court reasoned that the Park Service would have to approve the "demolition," such approval would constitute an undertaking, and therefore the Advisory Council would be entitled to comment under section 106 of the NHPA. In reaching this conclusion, the court relied upon a communication from the Park Service, which memorandum outlined the steps which would have to be taken by the village in conformity with the NHPA, and accordingly, the court followed the Park Service interpretation of the statute which the Park Service was charged with administering.

C.

One of the issues which arose during the trial of the case at hand was which LWCFA grants manual was to be applied to the LWCFA grant contract. The contract in 1978 incorporated a grants manual into the agreement between the predecessor of the Park Service and the State of Nebraska. (Exhibit 217, p. 6, para. L). This contract provision provides: "The State shall comply with the policies and procedures set forth in the Bureau of Outdoor Recreation Manual. Said Manual is hereby incorporated into and made a part of this agreement." (Exhibit 217, p. 6, para. L).

I received into evidence Exhibit 282, also referred to as Exhibit 2003, which is the spring 1978 grants manual. I refused the offer of Exhibit 217(G), the current grants manual, because, to the extent that it differed from the manual in existence at the time of the 1978 contract, there

was no evidence from which I could conclude that the parties to the contract intended to give the federal agency the unilateral authority to amend the contract by revision of the grants manual. My judgment in this regard is in accord with the practice of the Park Service as testified to by Mr. Kenneth Compton, the Chief of the Recreation Branch, Midwest Regional Office of the Park Service. (Vol. II, TR 336:23-343:23). My ruling is also consistent with opinion of the United States Department of the Interior, Office of the Solicitor (Exhibit 2018).

I gave the plaintiffs and the intervenor an opportunity to show why the most recent grants manual should be received for some purpose other than to establish the terms of the contract, and they failed to set forth any logical reason. (Vol. II, TR 399:24-402:24; 491:21-492:23; 990:16-991:13). (It should be noted that in their pretrial brief, the plaintiffs and the intervenor took the position that this "issue [is] primarily academic in any event" because the contract is governed by the LWCFA statutes, the statutes remained constant, and the "provisions of the Manual are not significantly different." Trial Brief of Plaintiffs and Intervenor at 6-7.)

Accordingly, I have not applied the recent manual to the facts of this case. In particular, I have not applied section 650.4.3.C of the recent manual, (Exhibit 217G). Therefore, the first argument advanced by the plaintiffs and the intervenor regarding the park is not applicable, because the the manual upon which they rely was not received in evidence. In any event, the application of the current manual would not have materially changed .the views expressed in these findings and recommendations.

III.

There was no evidence to suggest any involvement with the ICC and this project (Exhibits 340, 2022). Mr. Edward Fogarty, counsel for Proud and Mercer Management Company, candidly told me that no trackage that touches the boundary of the Canyon is subject to ICC approval. (Vol. I, TR 28:5-9). Moreover, Mr. Fogarty told me that the removal of the one track which he thought was subject to ICC approval would not disrupt service to the shippers served by the track. (Vol. I, TR 30:19-23). Mr. Dennis Duffy, a railroad employee, testified that the track, the "side hill lead" which the plaintiffs and intervenor claimed required ICC approval prior to change, was an "industrial" track, (Vol. II, TR: 484:21-485:1), and that service to shippers would not be curtailed, (Vol. II, TR 483:23-484:2), by the relocation. The portion, about one-half of a mile, of the "side hill lead" to be "abandoned" is located solely within the State of Nebraska (Exhibit 292). Relocation of "industrial" tracks, within one state, where shippers continue to receive service, does not require a license or permit or approval from the ICC. *Simmons v. ICC*, 808 F.2d 22, 24 (7th Cir. 1986) (rerouting resulting in cessation of a fifteen mile segment of track did not require an abandonment application where a shipper would continue to receive service). Indeed, 49 U.S.C. § 10907(b)(1) provides that the ICC has no authority to regulate the abandonment of this type of track if it is located or intended to be located in one state.

Moreover, even if the ICC were or should be involved in some way, which at this point is gross speculation, on the record before me there is no evidence to conclude that, (a) such federal action would be a legal

condition precedent to the implementation of the entire project, or, (b) that the ICC could exercise such factual control over the "federal portion" of the project that the ICC would be required to consider project-wide environmental or historic preservation issues, such as those relating to the Canyon. *See Ringsred v. City of Duluth*, 828 F.2d at 1307-08; *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d at 272-73. This being so, the involvement with the ICC would be incidental and would not require or permit NHPA or NEPA action by the ICC insofar as the Canyon is concerned. *Id.*

IV.

I turn next to consider the involvement of the Corps.

A.

Mr. John Morton of the Corps does have federal regulatory authority pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 and section 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, to issue licenses or permits, but he testified, without contradiction, that the project did not require such licenses or permits. (Vol. I, TR: 261:22-265:7). Even if the project required a section 404 or section 10 permit, our circuit has made it clear that these types of permits do not authorize the Corps to do a project-wide review of the nonfederal portion of the project. *Winnebago Tribe*, 621 F.2d at 272. *Accord Ringsred*, 828 F.2d at 1308-09. (I decline to follow *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1430-31 (C.D. Cal. 1985), because *Marsh* expressly ignores and contradicts the teaching of *Winnebago Tribe*, which is binding in our

circuit.) Jobbers Canyon is under the control and ownership of the ODF. (Vol. I, TR 91:8-92:9), which is a private nonprofit corporation. (Vol. I, TR 84:9-18). There is no evidence that the ODF acquired the Canyon with a federal license or permit or assistance, and there is no evidence that the demolition of the Canyon requires a federal license or permit or assistance. Therefore, even if a section 404 or section 10 permit were required, the Corps would have no jurisdiction to consider the nonfederal portion of the project, which would include Jobbers Canyon.

B.

The only federal employee who testified that he had any "control" regarding the redevelopment project said that he had no authority to permit or license the redevelopment or Jobbers Canyon. (Vol. IV, TR 984:16-985:1). Mr. LaRandeau testified that his office – responsible for supervision of the operation and maintenance of the levee by the Corps – could require the city to submit any plans for realigning the sewers or other structures to his office for design approval *if* the City wanted the sewer or other structure to interface with the levee, but this authority was expressly limited to the levee right-of-way. (Vol. IV, TR: 957:3-10; 972:2-18) (Exhibit 293, paras. 2.3(5), 5.2.1; Exhibit 293A). The right-of-way is outside of, and east of, the Canyon. (Vol. IV, TR: 971:14-22; Exhibit 293A; Exhibit 201, p. 2, fig. 5). Indeed, although it is not perfectly clear, it appears that the right-of-way is outside the boundaries of the redevelopment area (Exhibit 201, p. 4 and fig. 5), although this finding is not crucial. The testimony was that certain sewers would

be realigned and would, as they had in the past, intersect with the levee. (Vol. IV, TR: 926:1-930:13) (Exhibits 289 and 341). However, the testimony was that the realignment will not increase the effluent discharge, (Vol III TR: 656:14-18), and basically all that would happen is that the "internal connects" would be changed, without material change occurring to the distribution system to the river. (Vol. III, TR 657:4-19).

The ground upon which the levee sits is owned by the city, (Vol. IV, TR: 986:4-13), and the levee is operated pursuant to the operations manual – essentially an agreement between the city and the Corps, (Exhibit 293), in which both the city and the Corps seem to share responsibilities. (Exhibit 293, sections I and II). The Corps has legal capacity to supervise the operation of the levee pursuant to the manual, (Exhibit 293), because the city, as the responsible plan sponsor for the construction of the levee, must operate the levee in accord with the regulations adopted by the Corps. 33 U.S.C. § 701c(c).

This type of federal "approval" is incidental to, and not a legal condition precedent of, completion of the entire redevelopment, as the Corps' authority is certainly not project-wide, but rather is limited by the plain wording of the statute to approval of design specifications of sewers or other structures which intersect the levee. *Id.* Ecological, and presumably historical, concerns have been held not to be within the "zone of interests" protected by 33 U.S.C. § 701c. *Akers v. Resor*, 339 F. Supp. 1375, 1377-78 (W.D. Tenn. 1972). It further appears that the Corps has very little discretion over the "federal" portion of the project, since its authority is fundamentally limited to approving a design which will have no impact

upon the levee in the first place. (Also it seems that the City could simply not change the sewer, and thus avoid the Corps altogether.) Moreover, there is no evidence that the Corps has given, or will give, any direct financial aid to the redevelopment project. Finally, as noted, the overall federal involvement of the Corps on the redevelopment project is extremely limited, and the Corps has no relationship whatever with the ODF, which controls the Canyon. Since the ODF could demolish the Canyon without the Corps' approval, and since the Corps' involvement with the entire project is so limited, even if the Corps had to conduct some type of environmental or historical assessment, the Corps' review jurisdiction would be limited to the levee and would not include the Canyon. *Ringsred v. City of Duluth*, 828 F.2d at 1307-08; *Winnebago Tribe*, 621 F.2d at 272-73.

The plaintiffs and the intervenor also contend that a pedestrian overpass would be built touching the levee. (As nearly as I can tell, this would be a viewing stand so folks could view the Missouri River.) At best, the information provided to me in this regard suggests that the pedestrian overpass is nothing more than a possibility that the designer intended to leave open and study. (Vol. III, TR:618:25-619:3; 619:21-620:11; 620:24-621:4; 621:7-622:1; 625:24-626:15; 626:21-24). In any event, assuming the building of a pedestrian overpass touching the levee or the right-of-way, on the record before me, the same analysis suggested above regarding the sewers is applicable to the optional pedestrian overpass; therefore, the Corps' review authority would not extend to the entire project.

I also note that the plaintiffs and the intervenor contend that building the lake in Central Park East would invoke the Corps' jurisdiction. There is no evidence that the lake would intersect the levee or touch upon the levee right-of-way, and, on the contrary, it appears that the lake would not intersect the levee. (Exhibits 201, fig. 5; 203; 293) (Vol. IV, TR: 971:14-22). As a consequence, the Corps does not believe that it has the authority to regulate the lake. (Vol. IV, TR 951: 21-23; 983:14-19). In any event, assuming that the lake touched the levee or the right-of-way, on the record before me, the same analysis regarding the sewer is applicable to the lake; therefore, the Corps' review authority would not extend to the entire project.

V.

As previously noted, most of the evidence and argument in this case dealt with Central Park East and the Park Service's obligations under the LWCFA. The arguments of the plaintiffs and the intervenor are complex and require a lengthy recitation of the facts for one to fully understand the parties' positions.

A.

(1)

Sometime in 1978, Douglas County began preparing information to be used to obtain federal funds for the acquisition and development of a park in an area between 10th Street on the west, the railroad track by the levee on the east, Douglas Street on the north, and Howard Street on the south. The evidence with respect to who prepared

what and when on behalf of the county, the State of Nebraska, or the Park Service is vague at best. This ambiguity is apparently due in part to the passage of time, the fact that the Park Service changed its office from Denver to Omaha, and because the County could not locate its file.

On May 15, 1978, George Buglewicz, Chairman of the County Board of Commissioners, wrote to Eugene Mahoney of the Nebraska Game and Parks Commission, stating:

> Transmitted herewith are the program narrative and environmental assessment comprising Douglas County's application for $300,000 from the Secretary of the Interior's Contingency Reserve of the Land and Water Conservation Fund. An authorizing resolution is included. This application is for land acquisition only. Rail relocation and consolidation and development are separate projects which will be completed as quickly as funds become available.

(Exhibit 218K).

(2)

Oliver Wolff, who forwarded the state's application for the County to the Park Service, identified the following documents as ones that he had in his file and forwarded with those furnished by the county: Central Park East Funding, (Exhibit 218B); the State Comprehensive Outdoor Recreation Plan ("SCORP") analysis prepared by Mr. Wolff's office, (Exhibit 218F); Letter from Governor James Exon to Cecil Andrus, Secretary of the Interior, dated May 18, 1978, (Exhibit 218G); Letter dated

May 15, 1978 from Governor Exon to Derrell Thompson, Regional Director of the Heritage Conservation and Recreation Service, transmitting an application of Douglas County for $300,000 in current year's funds from the Secretary of Interior's Contingency Reserve of the Land and Water Conservation Fund, (Exhibit 218H); Selection Criteria Analysis, (Exhibit 218I); Phasing and Cost Estimates, (Exhibit 218J); and a map, (Exhibit 218(O).

Mr. Compton testified that the following documents contained in his file were required as part of the application: the basic contract, (Exhibit 217, pp.1-6); Project Approval Information, (Exhibit 217, pp.8-10); the Environmental Assessment, (Exhibit 217, pp.12-16); the Program Narrative, (Exhibit 217, pp.22-23); Application reviews by the State Director of Planning and Programming, (Exhibit 217, p.24), the State Historic Preservation Officer, (Exhibit 217, p.26), and Metropolitan Area Planning Agency ("MAPA"), (Exhibit 217, pp.27-28); State Assurance of Compliance with the Civil Rights Act of 1964, (Exhibit 217, p.25); the Federal environmental assessment determination, the "Negative Declaration," (Exhibit 217, p.35); SCORP evaluation, (Exhibit 217, p.36); Selection Criteria Analysis, (Exhibit 217, pp.37-40); and the Project Description, (Exhibit 217, pp.88-90) (Vol. II, TR 313:24-322:6).

(3)

The basic contract consists of pages 1 to 6 of Exhibit 217. Both Mr. Compton, (Vol. I, TR 283:13-25), and Mr. Wolff, (Vol. III, TR 529:11-530:16), agree on this matter

The "Project Scope (Description of Project)" is defined on page 1 of the contract as follows:

> Stage 1: Douglas County will acquire 4.12 acres near the Missouri River on the east end of Central Park Mall in downtown Omaha. They [sic] will also relocate existing businesses, demolish old Structures, remove debris and convert the site to open space. (Estimated Cost: $600,000)
>
> Stage 2: Development of the site by relocating utilities and installing landscaping, footpaths, drinking fountains, comfort station, lighting, fencing, pedestrian overpass and street furniture. (Estimated Cost: $900,000)
>
> Any reference to the Bureau of Outdoor Recreation (BOR) contained in the agreement or in any attachments incorporated thereto, shall hereinafter be considered a reference to the Heritage Conservation and Recreation Service (HCRS).

(Exhibit 217).

The agreement indicates that it funds phase one of the project and that "[t]he following attachments are hereby incorporated into this agreement: 1. General Provisions Dated Dec. 1965 [and] 2. Project Proposal." (Exhibit 217, p.1). The general provisions were attached as Exhibit 1, (Exhibit 217, pp.3-6), but there was no attachment of the project proposal, apparently because it is contained on page one under the title "Project Scope (Description of Property)."

The general provisions of the contract specifically define "project" as that "project or project stage which is the subject of [the] agreement." (Exhibit 217, p.3). The only project stage which was funded in the agreement

was the acquisition of 4.2 acres of land east of the Central Park Mall near the Missouri River. (Exhibit 217, p.1, Stage 1). Section L of the general provisions of the contract specifically provides that the Bureau of Outdoor Recreation Manual is incorporated in and made a part of the contract. (Exhibit 217, p. 6). Both Mr. Compton for the Park Service, (Vol. II, TR 336:23-337:23), and Mr. Wolff for the state, (Vol. III, TR 541:19-25), agree that the manual which is incorporated is the one in existence as of the date the 1978 contract was executed. This is in keeping with the opinion of the Assistant Solicitor, Parks and Recreation, Department of the Interior. (Exhibit 218). The documents which are obviously integrated in the contract are the two pages which constitute the basic contract, (Exhibit 217, pp.1-2), the general provisions attached thereto, (Exhibit 217, pp.3-6), and the Bureau of Outdoor Recreation Manual as it existed on June 16, 1978. (Exhibit 217, section L; Exhibit 282). There is no testimony of any witness who participated in negotiating the contract that any other document was intended by any party to the contract to be integrated into or made a part of the contract.

(4)

The first amendment to the contract was executed on June 4, 1979 and made the following five specific changes in the contract: (1) the project period was extended from June 30, 1979 to December 31, 1980; (2) stage 2 and adding earth fill were added to the scope of the project; (3) the cost of stage 1 was increased from $600,000 to $1,500,000; (4) the assistance for stage 1 was increased

from $300,000 to $750,000; and (5) references to the Bureau of Outdoor Recreation ("BOR") in the original agreement and attachments was changed to "hereinafter be considered a reference to the . . . HCRS." In all other respects, the original agreement was to remain in full force and effect. (Exhibit 217A).

The second amendment to the contract was executed on October 15, 1980 and contained two specific changes in the agreement: (1) the project period was extended to December 31, 1982; (2) the project scope was amended through adding " 'by negotiation and donation' after 4.12 acres and picnicking and support facilities." In all other respects, the agreement was to remain in full force and effect. (Exhibit 217B).

The third amendment to the agreement was executed on September 30, 1981 and made two specific changes in the agreement. The land acquisition was increased to about sixteen acres, and a lake development was added to the project scope. Any reference to the HCRS or the BOR contained in the project agreement "shall hereinafter be considered a reference to the National Park Service." In all other respects, the agreement was to remain in full force and effect. (Exhibit 217C).

The fourth amendment to the agreement, executed on November 30, 1982, extended the project period to December 31, 1983. (Exhibit 217D). The fifth amendment, executed on December 3, 1984, was also an extension of the project period to December 31, 1984. (Exhibit 217E).

The final amendment, executed February 6, 1986, deleted from the project scope: relocation, picnicking facilities, lake development, utility relocation, landscaping,

footpaths, drinking fountains, comfort stations, lighting, fencing, pedestrian overpass and street furniture. (Exhibit 217F). This was necessary because there were not sufficient funds necessary to do the stage II development items. (Exhibit 217F, p.4).

(5)

Contract 31-00507 between the State of Nebraska and the Park Service was closed out. The LWCFA Final Compliance Onsite Inspection Report was made by Mr. Wolff on October 21, 1985, and all the work was completed in conformity with the grant agreement and amendments, according to Wolff. (Exhibit 229). In that report, Wolff indicated that the 6(f)(3) boundaries had remained intact. (Exhibit 229). He based that conclusion on his personal assessment that "[t]here was no encroachment on what appeared to be the land we had assisted in acquiring." (Vol. III, TR 536:23-24). The final project billing was made on December 31, 1985. (Exhibit 230). A complete audit of the project was made on January 3, 1986. (Exhibit 231). Final payment was made to the county on February 6, 1986. (Exhibit 232). On February 19, 1986, Mr. Grasso, the Land and Water Conservation Fund Project Officer for Project 31-00507, on behalf of the Park Service, advised Mr. Mahoney, Director of the Nebraska Game and Parks Commission, by letter as follows:

> Please consider this correspondence official notice that all necessary final documents have been received and found acceptable for the following Land and Water Conservation Fund Project element(s):

31-00507 – D/Central Park East

Receipt of this correspondence constitutes completion of element close-out requirement.

In accordance with the L&WCF Grants-in-Aid Manual, we wish to point out that actual expenditures are subject to verification by audit and the elements are subject to an onsite inspection by the National Park Service at any time. Additionally, element records must be retained by the grantee for 3 years after the date of final reimbursement.

(Exhibit 233).

(6)

Paragraphs B.3, B.6, B.8, and I.1 of the contract between the State and the Park Service are the paragraphs about which the plaintiffs and intervener primarily argue; these paragraphs provide:

B. Project Execution

. . . .

3. The State shall secure completion of the work in accordance with the approved construction plans and specifications, and shall secure compliance with all applicable Federal, State, and local laws and regulations.

. . . .

6. All significant deviations from the project proposal shall be submitted to the Director for prior approval.

. . . .

8. The acquisition cost of real property shall be based upon the appraisal of a competent appraiser. The reports of such appraisers shall be available for inspection by the Director.

. . . .

I. Use of Facilities

1. The State shall not at any time convert any property acquired or developed pursuant to this agreement to other than the public outdoor recreation uses specified in the project proposal attached hereto without the prior approval of the Director.

(Exhibit 217, pp. 1-6).

In this regard, the plaintiffs and the intervenor draw the court's attention to section 685.2.1 of the grants manual, which provides in pertinent part:

> Property acquired or developed with assistance from the Fund shall be retained and used for public outdoor recreation. Any property so acquired or developed shall not be wholly or partly converted to other than public outdoor recreation uses without the approval of the Director. . . . Such approval will be given only upon such conditions as the Director deems necessary to assure the substitution of other outdoor recreation properties of at least equal fair market value and of reasonably equivalent usefulness, quality and location.

(Exhibit 282, section 685.2.1).

The federal defendants particularly draw the court's attention to section 640.2.8 of the grants manual which makes it clear that: *"It is not necessary that the eventual*

development of the land acquired with Fund assistance be carried out with Fund assistance, or that such unassisted development be approved by [the federal agency] as long as it is in accord with the purposes for which the acquisition was made." (Exhibit 282, section 685.2.1).

(7)

As one might expect, there are various statements made either before this litigation was commenced, or a while the litigation was in progress, that each party suggests indicate the inconsistent position of the other. In large measure I have discounted the significance of these admissions because I believe they represent the preliminary views of the writer and speaker, often times made with little background information. In other cases, these statements are not indicative of the true position of the author if read in context with other documents. Some of the more important statements are as follows.

The plaintiffs and the intervenor point to a "Program Narrative," (Exhibit 217, pp. 22-23), which accompanied the application and which contemplated that in the future it was the hope of the county that Jobbers Canyon could be developed into mixed retail, office, and residential use, providing a population for use of the park by about 5000 people. On the other hand, the defendants point to the so-called Omaha Central Business District Plan ("CBD"), (Exhibit 216), which was cited in the "Annotated Bibliography," (Exhibit 218M), which bibliography was submitted with the application, and which plaintiffs and intervenor cite for the proposition that maintenance of

Jobbers Canyon was always contemplated. The defendants point out, however, that the Omaha CBD states in part that the some of the warehouses "will not prove to be restorable because of the factors of economics and market," that final design of the riverfront development cannot be accomplished "until some of the buildings that currently exist are ear-marked for demolition," and only a couple of hundred dwelling units could be developed in the near future. (Exhibit 216, p.88).

Before the agreement on redevelopment was completed and signed, during the process of negotiation, Mr. Shukert, then the City of Omaha Planning Director, wrote a memorandum dated October 9, 1987, (Exhibit 251), to the Mayor of the City of Omaha expressing Mr. Shukert's concern about the negotiations with ConAgra with regard to the development of Central Park East, which memorandum states in pertinent part:

> ConAgra apparently wants to control the nature of development in the park. . . . My concern is that control over "architecture" could extend to control over activities and uses in the park. Since the park development is one of the keys for public participation in the project, we must retain control over our land. I don't object to architectural review if it is legal. However, ConAgra cannot be in a position to limit uses of the Park.
>
> . . . .
>
> As you know, I have always had mixed feelings about this project. I consider the loss of the Jobber's Canyon to be a serious loss to the city, although I know many people don't share that belief. I have rationalized this on the basis of: 1) the public benefit of completing the Central

> Park Mall and Riverfront Park; 2) the need to retain a major corporate employment base in downtown and the consequences of more hemorrhaging of office employment to our other downtown plans and projects; and 3) the possibility of establishing a self-sustaining development market in downtown. I regretfully believe that the scales of costs and benefits are tipping the other way. ConAgra, perhaps understandably, clearly wants *total* control of and limited public access to its immediate environment. The company controls it could have that control at a suburban site [sic]. However, such control runs counter to the original Central Park East concept and to the overall sense of a city. Central Park East was originally considered a people place, like other waterfront projects in cities like Baltimore and Minneapolis. Now, it has changed into a private corporate campus, to be viewed by our citizens from afar.

(Exhibit 251).

At trial, however, Mr. Shukert, who struck me as believable, brilliant, and, magnificently educated (having received his Bachelor of Arts degree in City Planning from Yale, where he was a member of Phi Beta Kappa, and his Master's degree in Architecture from the University of California at Berkeley (Vol. I, TR 171:23-172:3)), made it clear that these concerns were concerns he had during negotiations, which concerns were alleviated by the ultimate Redevelopment Agreement. He stated: "The memorandum reflected a situation of negotiations at a given time. . . . I believe that the park as it is currently designed will be not only a distinguished park but also is fully in compliance with the original intention of park development." (Vol. I, TR 172: 23-24; 173:1-4).

Likewise, Mr. Compton (who struck me a credible, competent, and objective), a Park Service supervisor (who was a longtime employee of the Park Service, stationed at various times throughout the country, holding Bachelor of Science and Master of Science degrees from Rutgers University), and the principal person responsible for LWCFA compliance, allowed (apparently pursuant to a delegation of authority procedure in the Park Service, (Vol. IV, TR 410:13-412:5), a letter to be sent to the State, (Exhibit 241), on March 11, 1988, signed by a subordinate over the typewritten designation of Mr. Compton's name. The letter, which stated a number of concerns, appears to be dated before the redevelopment agreement was signed, and states in pertinent part:

> In order to avoid unnecessary delays, early coordination between ourselves, the State, and the local units of government involved is essential. Douglas County and the city of Omaha should be made aware of the following compliance issues:
>
> 1. The type and extent of development outside the boundaries of Central Park East may be such that the recreational integrity of the park, itself, will be compromised. This would constitute a conversion of use under Section 6(f)(3) of the L&WCF Act, as amended. Enclosed is a United States Court of Appeals' decision that may have application to the Central Park East situation. We are unable at this time, lacking sufficient information on the Riverfront Redevelopment Project, to determine whether or not this may be the case.
>
> 2. An architectural review committee has been proposed (the Omaha City Planning Board has suggested that it consist of representatives form the city; the Omaha Development Foundation;

ConAgra; Landmarks, Inc.; and "a planner of national prominence"). This proposed committee would have no veto power over the development of Central Park East. As a condition of the L&WCF grant, Douglas County is to maintain adequate control over the project site. We are very concerned that Douglas County would relinquish control over Central Park East to the proposed architectural review committee, in contravention of L&WCF program requirements.

3. From what we have learned about the proposed Riverfront Redevelopment Project, access to Central Park East from the west would either be severely limited or made impossible by ConAgra. Adequate public access to the park is a must; both we and the State must insist that such access be part of the final plan for the Riverfront Redevelopment Project.

4. There has been speculation that the remains of 19th century river boats may be found when the proposed lake is excavated for Central Park East. If such remains are found, historic preservation provisions found in Chapter 650 of the "L&WCF Grants Manual" must be followed. Any development delays this may cause are unavoidable.

5. On September 19, 1986, we wrote to you concerning the need for the establishment of "a logical Section 6(f)(3) boundary for Central Park East". . . . To effect this end, several actions were required of the county and the city. . . . In the intervening 16 months, the above local units of government have not acted to establish a rational boundary for the park.

Please convey our above concerns to the project sponsor and to the city. It is essential, if the

> Riverfront Redevelopment Project and the development of Central Park East are to be realized in a timely manner, that all parties involved – Federal, State, and local – work together and communicate effectively. Your efforts to this end are most appreciated.
>
> Sincerely,
>
> [signed by a subordinate to Mr. Compton]
>
> Kenneth R. Compton
>
> Chief, Recreation Grants Division

(Exhibit 241, Letter from Kenneth R. Compton, Chief, Recreation Grants Division, National Park Service, to Oliver E. Wolff, Federal Aid Administrator, Planning and Programming Division, Nebraska Game and Parks Commission (received Mar. 14, 1988)).

However, Mr. Compton, after reviewing the letter, testified, among other things, that the letter was overzealous in part and that in other parts he could not find "legal jurisdiction" for the statements contained in the letter. (Vol. II, TR 377:19-23). After Mr. Compton had a chance to actually review the Redevelopment Agreement, he testified at trial that the "Architectual Review Committee . . . does not have jurisdiction over Central Park East," (Vol. II, TR 443:17-24), that the Redevelopment Agreement does not constitute or cause a conversion of the Park under the LWCFA (Vol. II, Tr 448:7-449:9), that the section 6(f)(3) boundaries of the park were set when the property was purchased, and that a plat map was not required at the time of the initial LWCFA grant. (Vol. IV, TR: 374:1-375:15).

The defendants also refer me to various letters and a telephone call, memorialized by a memorandum prepared by the recipient of the call, to suggest that even the Advisory Council does not believe that there is federal involvement with this project. Mr. Robert Fink, Chief of the Western Division of Project Review for the Advisory Council, began to write letters to various federal agencies, after he learned of the project, attempting to prompt section 106 review, (Exhibits 1013, 1014, 1015 and 1016), after the Nebraska State Historical Society solicited action from the Advisory Council. (Exhibit 1012). After apparently receiving responses from the various federal agencies, Mr. Fink told Lynn Meyer of the City's Heritage Preservation Commission that the Advisory Council sent the letters out as "a longshot," that normally the Advisory Council did not go around reminding sister federal agencies of their responsibilities, and that "two ingredients are necessary to trigger Section 106 review: federal involvement and historic properties. . . . [I]t appears that we presently have the latter, but not the former." (Exhibit 1019, Memorandum from Lynn Meyer to Landmarks Heritage Preservation Commission). Mr. Fink acknowledged that the memorandum fairly represented his statements to Mr. Meyer. (Exhibit 1032, Deposition of Robert Fink, 52:15-22).

The plaintiffs and the intervenor point out that Mr. Fink's supervisor, Dr. King, through the Advisory Council, took a different position about two weeks after Mr. Fink's telephone call, (Exhibit 247, p. 2), that Dr. King normally looks at the more sensitive cases, and that Dr. King was ultimately assigned to the case. (Exhibit 245, Deposition of Dr. King, 716-72:8).

(8)

One of the principal arguments regarding "conversion" of LWCFA lands acquired for the park regards the manner in which the parties have decided to finance the development of the park. I shall briefly describe the scheme for raising money.

The park is a formally dedicated public park; in the 1985 ordinance which dedicates the park, the county recognized that LWCFA funds were used, that the grant contemplated dedication as a public park and proclaimed, as a matter of law, that the ground is "dedicated for use by the public as a public park and outdoor recreation area." (Exhibit 1011). After the redevelopment agreement became a reality, the county wanted to finance the development of the park, but did not want to use federal monies; rather, the county chose to rely upon specific state statutes to develop a method to finance the scheme. Accordingly, the county adopted a resolution implementing the scheme and indicating, among other things, that: (a) the ODF would issue seven million dollars of bonds to develop the park; (b) the ODF would issue two million dollars worth of grant anticipation notes in anticipation of the county receiving certain private gifts of money; (c) the ODF would enter into a trust indenture with a commercial bank providing for payment of the bonds; (d) the ODF would "lease" the ground from the county, and the county would lease back the ground from the ODF, thereby providing an income stream to pay the bonds; and (e) the park would be used by the county "as a public park serving Douglas County, Nebraska." (Exhibit 207).

This resolution, (Exhibition 207), explicitly recognized certain Nebraska statutes, including section 23-820 of the Nebraska Revised Statutes. This statute authorizes counties in Nebraska to enter into agreements for the redevelopment of a park; however, this statue limits the power of the counties to engage in this activity "only for the express purpose of acquiring, holding, improving and operating any park." Neb. Rev. Stat. § 23-820 (Reissue 1983). Thus, any agreements regarding the park are limited as a matter of law by at least two things: first, the park is by ordinance a dedicated public park, (Exhibit 1011), which must be used by county as a "public park serving Douglas County, Nebraska," (Exhibit 207), and, second, by statute, *id.*, the park can only be used or held as a park.

In order to implement this scheme, the ODF caused the Omaha Riverfront Development Corporation ("ORDC") a private nonprofit corporation, to be incorporated, which had as its purpose the development of Central Park East as a "public park." (Exhibit 213). The county then leased the park ground to the ORDC pursuant to the "Ground Lease Agreement" for a nominal fee. (Exhibit 209). The county then leased back from the ORDC the land and any improvements on the park to "be used by County as a public park"; the county agreed to levy taxes to pay for the improvements; the county had the repair and maintenance obligation; the county had the risk of loss; the ORDC agreed to stand the cost of improvements, and the county agreed to pay rent in an amount equal to the development cost but no more than such costs; and the lease terminated upon payment of the

bonds, with any excess monies then donated by the ORDC to the county. (Exhibit 210).

The ORDC, but not the county, entered into a trust indenture with a commercial bank. (Exhibit 211). The purposes of this indenture was to secure payment of the bonds. Although the ORDC agreed to keep the park rented so as to provide an income stream, the only pledge to the trustee for security for payment of the bonds was "revenue" and "income" derived from the park, i.e., the rent payments. Thus, the ORDC did not pledge the park, rather only the income derived therefrom, and the county, at least on the state of the record here, did not mortgage or encumber the park.

(9)

Going along with the contention of the plaintiffs and the intervenor that the county has lost control of Central Park East, the plaintiffs and the intervenor point to the relationship of the Redevelopment Agreement, and the attached park covenants and redevelopment covenants.

The redevelopment covenants call for a committee to approve certain architectural designs, which committee is comprised of, among others, representatives of the city, Conagra, and the ODF, (Exhibit 202, attached Exhibit 7). The county is not by the terms of the redevelopment agreement or redevelopment covenants obligated to sign the redevelopment covenants, and the Redevelopment Agreement specifically states in section 4.1.8 that "[t]he responsibility to acquire, design and construct the Park, ("Park" meaning "public park," (Exhibit 202, section

1.1)) . . . shall *solely* be that of the County." (Exhibit 202 (emphasis added)).

The plaintiffs and the intervenor assert that the county is bound to follow the architectural review committee's orders regarding the park because the park covenants which the county does sign, (Exhibits 202, attached Exhibit 4), require that the overall design for landscaping generally must be consistent with the redevelopment area. (Exhibit 202, attached Exhibit 4, Section 8 (c)). In the main, however, the park is to be designed according to the "Park Improvement Plan," (Exhibit 202, attached Exhibit 4, sections 6(a) and 8(a), and the "Park Improvement Plan" is defined, (Exhibit 202, attached Exhibit 4, section 1), as the 1983 Henningson, Durham and Richardson plans. (Exhibit 206).

Yet, the expert for the plaintiffs and the intervenor, Dr. Thomas Buchanan, described the 1983 plans as a "continuum" of the original 1978 application, (Vol. IV, TR 781:18-25), which "continuum" became a part of the LWCFA grant by amendment, (Vol. IV, TR: 782:15-23 (stating that "[s]o there were several amendments of change to that contract, to change it to what it was developed into in '83")). Dr. Buchanan expressed no specific criticism of the 1983 plans. (Vol. III, TR 680:23-25 (stating that the 1983 plan had "clear circulation plans"); Vol. III, TR 681:9-12 (stating that the paper was "readily accessible" and was the "focal point for people in the area")). The author of the 1983 plan stated that the plan was essentially consistent with current plans. (Vol. III, TR: 640:642; Vol. III, TR 644:21-645:5 (stating that "[w]e have made very painstaking efforts to try to use as much of the old plan as we possibly could.")).

B.

Three arguments advanced by the plaintiffs and the intervenor are similar: (1) the Central Park East project was improperly closed out as an acquisition project instead of an acquisition and development project which would have required approval, and thus section 106 review, of plans when the park was subsequently developed; (2) the Central Park East contract and amendments call for review, and thus section 106 review, of the development plans; and (3) the Central Park East project was improperly closed out before the required so-called 6(f)(3) boundaries were set, and these boundaries must now be approved, and thus a section 106 review is required.

(1)

First, it is true that the Central Park East project started out as an acquisition *and* development project in scope, although the first funds were programmed for acquisition. The final amendment to the project, (Exhibit 217F), made it clear that development was no part of the project: "When acquisition was complete, there weren't funds available to do the stage II development items. . . ." (Exhibit 217F, p. 4, para. "Justification"). I find no support in the cases, the LWCFA statutes, or the LWCFA regulations to support the conclusion that the Park Service improperly closed out the project as an acquisition project.

(2)

Second, believing as I do that the project was properly closed out as an acquisition project, the "general conditions" regarding development and approval of development plans obviously are a nullity and do not apply. Indeed, unassisted nonfederal development, according to the grants manual, need not be approved. (Exhibit 282, section 640.2.8).

(3)

Third, the plaintiffs and the intervenor complain about the lack of a logical section 6(f)(3) boundary. What they mean to allege is that the boundaries of the acquired property must be set, or "conversion" under the anticonversion provisions of the LWCFA cannot be determined. *See* 16 U.S.C. 460*l*-8(f)(3). As a factual matter, the plaintiffs and the intervenor complain about the lack of an approved plat or site map, which one could use to set the 6(f)(3) boundaries.

There is, however, no evidence that a plat or site map was required by law or regulation, and it affirmatively appears, according to the testimony of Mr. Compton from the Park Service, that no such map was required when the contract was entered into. (Vol. II, TR 347:17-348:16; 374:24-375:15). According to Mr. Compton, it is the project documents, including the description of the land acquired, not a map, that sets the 6(f)(3) boundaries, (Vol. III, TR 367: 1-4; 406:18-25; 413:11-18; *See also* Exhibit 235), and that, although the Park Service used maps, the maps were to be prepared from the project documents. (Vol. II, TR 462:8-463:24). It is quite clear that Mr. Compton of the

Park Service used maps for a visual aid, not to set a boundary. (Vol. II, TR 348:1-23). Mr. Wolff, of the State of Nebraska, agreed with Mr. Compton that the boundary was set by the land actually acquired. (Vol. III, TR: 569:20-23).

Put simply, the plaintiffs and the intervenor have failed to establish any law or regulation which requires that prior to closing out a project that a section 6(f)(3) boundary must be established in the manner claimed. Inasmuch as Mr. Compton is satisfied with the 6(f)(3) boundary, (Vol. II, TR 371:22-372:25), and there is no evidence that the Park Service was required to do something differently, the claim of the plaintiffs and intervenor must fail.

C.

Next, plaintiffs and the intervenor claim that the basis for the original funding has been called into question by changes in Central Park East, and thus the Park Service is required to retroactively review the project, including a section 106 review of Jobbers Canyon.

(1)

The legal predicate for this argument is *Friends*, 754 F.2d at 446-52. I find that *Friends* is not on point as a matter of fact, that the language relied upon by plaintiffs and the intervenor is *dicta*, and that the *dicta* is of questionable validity. In *Friends*, the conservation easement was clearly intended to "prevent further development of the land underlying the easement." *Id.* at 450. By the

proposed amendment, the local authorities would be conveying away their right to control future development and thus, according to the court, a "conversion" of the original easement would take place. *Id.* at 451. Moreover, the court secondly found that even if a conversion would not take place, since the change in easement significantly altered the original utility of the easement – development control – the basis for the original funding was called into question, and federal approval was required. *Id.* at 452.

It is this last holding upon which the plaintiffs and the intervenor rely in the instant case – even if there is no conversion or breach of the contract documents, if a change is important enough then federal approval is required. This holding was pure *dicta;* the court had held that a conversion had taken place, and thus there was no reason to make the second legal conclusion. The second legal conclusion is not supported by any legal authority except general references to the applicable statutes. While it cannot be doubted that the Park Service can review for conversions or violation of the original grant documents, there is simply no legal authority to require the Park Service to review every change in a project which a court, having no expertise with LWCFA, may think calls into question the original basis for the grant. The Park Service, not the court, is the entity charged with administering the grant and yet *Friends* seems to suggest that courts have the legal authority to require the federal agency to make a review, not because of a conversion or violation of the grant contract, but because the court thinks that the change alters the essence of the original project and that, therefore, the Park Service ought to review the project. Maybe the *Friends* court is right that as a matter of policy

an administrator should be charged with such a duty; I cannot find, however, any legal authority for me to impose this policy choice.

(2)

In any event, I find no substantial change in Central Park East that calls into question the basis of the original funding. In *Friends* it must be remembered that the change involved was taking a conservation easement that in essence prohibited development, and rewriting the easement to allow a hotel chain to open up the area to development, including developing a golf course. Here, however, Central Park East was proposed as a public park; it is still proposed as a public park. The so-called "changes" are either minor changes or relate not at all to the park, but rather to Jobbers Canyon, and therefore are not changes in the original basis for the funding.

At best, there is a difference in opinion about the significance of the alleged "changes" between the expert for plaintiffs and the intervenor, Dr. Buchanan, (Vols. III & IV, TR), and Mr. Shukert with the city, (Vol. I, TR), Oliver Wolff with the state, (Vol. III, TR), Richard Niedergeses, the private park designer, (Vol. III), and Mr. Compton, (Vol. II, TR), and James Grasso, (Vol. IV, TR), with the Park Service. It is precisely these types of differences of opinion which are normally left to administrative agencies to sort out – not federal courts. The court has no experience in park planning which would properly justify the court in substituting its judgement for that of Mr. Compton as to whether, for example, a change in location of a park entrance vitiates the underlying basis

for the original grant. (By this I do not suggest that Mr. Compton's decision, or that of any other federal administrator, is free from court review. I only mean to suggest that changes clearly requiring the training of LWCFA grant administrators and supervisors, for purposes of interpretation as to whether the original basis for the LWCFA grant is undone, are matters with respect to which the court must approach with due deference respecting the federal agency charged with LWFCA supervision.)

Turning then to the particular points of attack, I understand from the trial and posttrial briefs of the plaintiffs and the intervenor, *see* Trial Brief of Plaintiffs and Intervenor at 12-13; Post Trial Brief of Plaintiffs and Intervenor at 17-19, the criticisms (control questions relative to the financing scheme and park covenants are discussed later) are as follows: (1) the park if limited to passive recreation; (2) when Jobbers Canyon falls, the population for the park and the "reason for being" of the Park evaporates; and (3) the general design of the park limits access and circulation and the park is not a "people park."

(a)

As to the "passive" versus "active" argument, these terms have no particular meaning – even Buchanan testified to a range of activities that are "active" and which would be allowed by a "passive"restriction. (Vol. IV, TR 746:9-748:15). Mr. Shukert testified that the terms have no real meaning and the park could be used for both "active" and "passive" recreation. (Vol. I, TR 185:23-188:1). I

find no basis to conclude that the "passive" limitation contravenes the original basis for funding. I note that according to Dr. Buchanan, the 1983 plans were a continuum of the 1978 concept, (Vol. IV, TR 781: 18-23), that the 1983 plans according to Buchanan became a part of the LWCFA grant by amendment, (Vol. IV, TR 782:15-23), and the man who prepared the 1983 plans testified that he attempted to follow these 1983 plans closely when preparing the present plan. (Vol. III, TR 640:1-642:25; 644:21-645:5).

(b)

A good deal of time is spent arguing that Jobbers Canyon was an area which the park was intended to serve, and without the Canyon the basis for the funding in the first place no longer exists. This argument begs the question, because there is no evidence that anyone *promised (or agreed as a matter of contract)* that Jobbers Canyon would be renovated as a condition precedent or condition subsequent to the grant, although it was clearly hoped that Jobbers Canyon could be preserved. It seems preposterous to suggest that every time the surrounding environment, which is not physically a part of the land acquired from the grant, changes, that LWCFA grants are called into question.

Even Dr. Buchanan testified that changes in the surrounding environment such as the complete destruction of Jobbers Canyon under some circumstances would not require a project amendment; of course, if no project amendment is required, the original basis of the funding is not called into question. I posed a question to Dr.

Buchanan, asking him to assume that the park was developed and that Jobbers Canyon was developed into apartments, as he thought the original funding contemplated. I also asked him to assume that the Jobbers Canyon apartments burned down. I then asked whether the destruction by burning of the apartments in Jobbers Canyon would require a project amendment. He replied that no amendment would be required. (Vol. IV, TR 784:18-785:5). (Counsel for Conagra put a similar question to the expert and received a similar answer. (Vol. III, TR 715:12-716:1).) The foregoing testimony demonstrates to me that the original basis for the funding is clearly not conditioned on the existence of the Canyon. My conclusion in this regard seems to make sense since the county has never owned, and never promised that it would acquire, the land underlying the Canyon. Put bluntly, a requirement cannot reasonably be read into the LWCFA grant which requires the county to maintain property which it never owned and never promised to buy. In my view, the original basis for funding was to acquire a park for use in downtown Omaha; the land was acquired for the park; the park will be constructed in downtown Omaha; and people in downtown Omaha will be able to use the park. There has been no change in the basis of the funding simply because Jobbers Canyon will not exist.

The plaintiffs and the intervenor rely upon the Opinion of the Solicitor of the Department of the Interior, (Exhibit 283n, pp. 3-4), for the proposition that the " 'entire area identified in the project agreement' is subject to the provisions of the Land and Water Conservation Fund Act and the conditions of the project agreement." (Exhibit 283N, p. 3). The plaintiffs and the intervenor

thus argue that Jobbers Canyon is clearly within the area identified within the project agreement, since the Canyon is referred to in various narratives submitted with the application. I believe that the plaintiffs and the intervenor misunderstand the Solicitor.

The Solicitor did not state that one looks at every document submitted to the Park Service to define the LWCFA project in order to determine whether a conversion has taken place; rather, the Solicitor clearly states that areas defined in the "agreement," (Exhibit 283N, p. 3), the contract "conditions" (Exhibit 283N, p. 3), and documents "incorporated by reference into that project agreement," (Exhibit 283N, p. 4), constitute the areas to be concerned about for conversion purposes. The Solicitor made it clear that "[w]e view the scope of section 6(f) to *be a product of the contractual agreement* between the NPS and the State with regard to the specific project in question." (Exhibit 283N, p. 4 (emphasis added)). Thus, simply because Jobbers Canyon might be described in an environmental or project narrative does not mean that Jobbers Canyon becomes integrated into the contract and therefore a part of the LWCFA project.

(c)

Finally, it is contended that the park design limits access and circulation of people in the park and that the park is not a "people park." However, I note that according to Dr. Buchanan, the expert for the plaintiffs and the intervenor, the 1983 plans were a "continuum" of the 1978 concept, (Vol. IV, TR 782:15-23), and Dr. Buchanan thought that the 1983 plans had "clear circulation plans,"

(Vol. III, TR 680:24-25), and that the park was "readily accessible" and a "focal point for people in the area." (Vol. III, TR 681:9-12). The author of the 1983 plans said that current plans were essentially consistent with the 1983 plans. (Vol. IV, TR: 640:1-645:5). At best, there is simply a difference of opinion, and certainly nothing of significance exists to suggest that there has been a substantial change in the basis for the original funding in this regard.

(d)

The plaintiffs and the intervenor rely upon *Morris County Trust*, 714 F.2d at 271-82, for the proposition that a federal agency must conduct a section 106 review during any time the agency has continuing authority over the project. *Morris County* is inapplicable here, for, among other reasons, the following: (1) the Central Park East federal project was closed out prior to the execution of the redevelopment agreement; (2) Jobbers Canyon, unlike the historic building in *Morris County Trust*, was never a part of the federal project; and (3) there is no basis for reopening the Central Park East LWCFA grant project.

The plaintiffs and intervenor also rely upon *Fill the Pool*, No. 82-CV-762 (HGM) (S.D.N.Y. Aug. 18, 1982) (memorandum-decision and order granting a preliminary injunction). *Fill the Pool* simply has no bearing on this case, although it does stand for the proposition, which is not disputed by anyone, that even after closing a LWCFA grant, the local sponsor must abide by the provisions of LWCFA contract prohibiting conversion. In *Fill the Pool*, the local sponsor was sued by preservationists claiming

the LWCFA funded pool was being destroyed in contravention of an express LWCFA contractual provision. Here, there is no LWCFA grant for Jobbers Canyon and no LWCFA agreement which pertains to the Canyon, let alone prohibits its demolition.

In sum, I find nothing which supports the conclusion that the original basis for the federal funding has been significantly contravened, and, therefore, the *dicta* in *Friends*, if it were the law, is not applicable as a matter of fact.

D.

The principal arguments regarding "conversion" of LWCFA lands acquired for the park regard the manner in which the parties have decided to finance the development of the park, and the restrictions contained in the redevelopment agreement respecting, among other things, the park covenants and the architectural review committee.

(1)

The park is a formally dedicated public park; in the 1985 ordinance which dedicates the park, the county recognized that LWCFA funds were used, that the grant contemplated dedication as a public park and proclaimed, as a matter of law, that the ground is "dedicated for use by the public as a public park and outdoor recreation area." (Exhibit 1011). After the redevelopment agreement became a reality, the county wanted to finance the development of the park, but did not want to use

federal monies; rather, the county chose to rely upon specific state statutes to develop a method to finance the scheme. Accordingly, the county adopted a resolution implementing the scheme and indicating, among other things, that: (a) the ODF would issue seven million dollars of bonds to develop the park; (b) the ODF would issue two million dollars worth of grant anticipation notes in anticipation of the county receiving certain private gifts of money; (c) the ODF would enter into a trust indenture with a commercial bank providing for payment of the bonds; (d) the ODF would "lease" the ground from the county, and the county would lease back the ground from the ODF, thereby providing an income stream to pay the bonds; and (e) the park would be used by the county "as a public park serving Douglas County, Nebraska." (Exhibit 207).

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The ORDC, but not the county, entered into a trust indenture with a commercial bank. (Exhibit 211). The purpose of this indenture was to secure payment of the bonds. Although the ORDC agreed to keep the park rented so as to provide an income stream, the only pledge to the trustee for security for payment of the bonds was "revenue" and "income" derived from the park, i.e., the rent payments. Thus, the ORDC did not pledge the park, rather only the income derived therefrom was pledged, and the county, at least on the state of the record here, did not mortgage or encumber the park.

The basic legal authority for the allegation that this finance scheme constitutes a conversion is found in the

plaintiffs' and the intervenor's interpretation of the opinion of the Solicitor of the Department of the Interior. (Exhibit 283N, p. 8). In that opinion the Solicitor, relying upon a previous opinion, (Exhibit 342), stated, in pertinent part, that a state could not "secure a proposed bond issue with project lands and facilities" and comply with the LWCFA, because "should foreclosure occur, a private party, not an agency of the State or of a local political subdivision, could acquire the property and convert it to other than public outdoor recreation use." (Exhibit 283N, p. 8 (citing opinions of May 22, 1970 and July 15, 1970)).

The Solicitor's opinion is not applicable here for the following reasons.

First, the county has not pledged, and did not "secure," the project lands and facilities to obtain credit from anyone; the only pledge was by the ORDC, and that was a pledge of the income which ORDC derived from the lease. Therefore, there could be no "foreclosure."

Second, even if the county went bankrupt, and the ORDC tried to take possession of the property, according to all the documents, the county ordinance, and the state statute, the park must be operated as a public park, regardless of what happens, and the property could not be converted to "other than public outdoor recreation use." (Exhibit 283N, p. 8). Indeed, the ORDC's only corporate purpose as a nonprofit corporation is to develop the real estate "*for use as a public park* popularly know as Central Park East." (Exhibit 213, art. III (emphasis added)).

Third, when the documents are read together, as they must be in order to make sense, and when the documents

are interpreted in connection with the dedication of the park as a public park by ordinance and by state statute, they contain "clear-cut provisions for adequate control by the governmental unit over the operation to assure public use of the facility on reasonable terms and proper maintenance." (Exhibit 283N, p. 9).

Fourth, even assuming that the plaintiffs and intervenor are correct and that the park would be "converted" upon default by the county, such a conversion has not yet taken place, as there has been no default or evidence that default is imminent. There is virtually no practical difference between what the county has done here, as opposed to the county issuing general obligation bonds which are unsecured. (Here, the county did not pledge the park, and if the county issued unsecured general obligation bonds, it would not pledge the park.) Had the county issued such bonds, and if the county were to go bankrupt, the park would be in essentially the same jeopardy about which the plaintiffs and intervenor complain, based upon the ORDC bond issue. Yet there is not the slightest authority for the proposition that if the county issued unsecured bonds, rather than the ORDC, that the county would somehow have converted the park under the LWCFA. Thus, the alleged "conversion" has not taken place, the county remains in full control of the dedicated public park, and the "conversion" is speculative at most.

Fifth, the financing scheme questioned by the Solicitor, (Exhibit 342, p. 3, Memorandum of Roy K. Wood), was one in which "[t]he participant's source of matching funds for these developments is the bond issue we are discussing." (Exhibit 342). In essence, the Park Service was confronted in Exhibit 342 with an LWCFA grant

application where the Department of the Interior was asked to give money and allow the "matching funds" ("earnest money", so to speak) required of the local sponsor to, in effect, be "borrowed," with the local sponsor giving the subject of the grant as a specific collateral pledge. Here, the matching funds required by the 1978 contract have been paid by the local sponsors. (Exhibit 231, Audit, indicating, for example, that the state's share paid as of January 3, 1986 was over $338,000.00). It is thus questionable whether the Solicitor's opinion is applicable to this type of case, where the Park Service is not being asked to fund the development and has previously received the matching funds for the acquisition.

For these reasons, the finance scheme does not, therefore, constitute a conversion.

(2)

Going along with the contention of the plaintiffs and the intervenor that the county has lost control of Central Park East, the plaintiffs and the intervenor point to the relationship of the Redevelopment Agreement, and the attached park covenants and redevelopment covenants.

The redevelopment covenants call for a committee to approve certain architectural designs, which committee is comprised of, among others, representatives of the City, ConAgra, and the ODF, (Exhibit 202, attached Exhibit 7). The county is not by the terms of the redevelopment agreement or redevelopment covenants obligated to sign the redevelopment covenants, and the Redevelopment Agreement specifically states in section 4.1.8 that "[t]he responsibility to acquire, design and construct the Park

("Park" meaning "public park," (Exhibit 202, section 1.1) . . . shall *solely* be that of the County." (Exhibit 202 (emphasis added)).

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644:21-645:5 (stating that "[w]e have made very painstaking efforts to try to use as much of the old plan as we possibly could.")).

I find that a plain reading of the redevelopment agreement mandates the conclusion that the county has the *sole* responsibility to design the public park, and hence there has been no conversion. I also find that the parameters for the design of the park contained within the Redevelopment Agreement are consistent with the original basis for the LWCFA funding.

VI.

I have spent a great deal of time dealing with arguments about alleged federal involvement with railroad tracks, sewers, and parks. Conspicuously absent has been any discussion of federal involvement with Jobbers Canyon, which is now owned or controlled by a private party, the ODF. On the record before me, the ODF has not asked, and is not required to ask, any federal agency for anything regarding the demolition of the Canyon or the use of the underlying real estate. (Exhibit 106). The ODF has never received any federal assistance regarding Jobbers Canyon. (Exhibit 106). Bluntly stated, there is a complete absence of evidence regarding federal involvement with Jobbers Canyon.

Not one case has been cited to me, and I can find none, which would suggest that this court has authority to order the ODF, a private party, to stop the demolition of Jobbers Canyon, *even if* the ICC, the Corps, or the Park Service had to conduct a full review of the entire redevelopment project. Let me be specific. Until a section

106 review is conducted, the ICC might prohibit removal of the tracks, the Corps might stop the sewers from being changed, and the Park Service might stop development of the park. But any action these agencies might take would be limited to their statutory authorities; none of these agencies have statutory authority of any kind over Jobbers Canyon. Even assuming that such agencies should be forced to consider the impact of what they might do, e.g., development of the park, on Jobbers Canyon, insofar as the ODF is concerned (and ConAgra, for that matter), the agencies do not have any power over the ODF, nor do the agencies have the statutory authority to grant or withhold anything from the ODF regarding the Canyon.

The federal agencies might say that one cannot remove the tracks because of the impact on Jobbers Canyon; the federal agencies might say that one cannot connect the sewers because of the impact on Jobbers Canyon; and the federal agencies might say that one cannot develop the park because of the impact on Jobbers Canyon. The federal agencies, however, have no authority to order the ODF not to demolish the Canyon, since it is the federal agencies which must comply with the NHPA and the NEPA, and not private parties who have no obligation to deal with the agencies in any event.

Certainly, if the ODF were required to seek something, or had sought something, from a federal agency regarding the Canyon, the agency and the court would have the power to control the ODF insofar as the subject of the ODF's involvement with the agency. Thus, in this sense, if a private entity is substantially involved with a federal agency, the private entity subjects itself to the

lawful authority of the agency, to the extent of the jurisdiction of the agency, and, therefore, to the power of this court. But the NHPA and the NEPA do not expand the jurisdiction and power of federal agencies to supervise private conduct not within the jurisdiction of a federal agency in the first place.

The point is that "while [a federal agency] has broad discretion to consider environmental impacts, that discretion must be exercised within the scope of the agency's authority." *Winnebago Tribe*, 621 F.2d at 272 (citation omitted). No federal agency has authority over Jobbers Canyon or the actions of the ODF with regard to the demolition of the Canyon. Here, the ODF is entirely free of federal involvement respecting the Canyon, and there is not even minimal federal involvement which the plaintiffs and the intervenor can point to. The reasoning in *Edwards*, 534 F.2d at 1243-46, and *Miltenberger*, 450 F.2d at 974, is applicable here; the court cannot enjoin purely private action which requires no participation by any agency of the federal government. Thus, without a "federal undertaking" or "major federal action" regarding the Canyon and the ODF, and there is none, ODF is free to "thunb its nose," so to speak, at the NHPA and the NEPA.

For example, one circuit court has held that a state may renounce federal aid, and avoid the NHPA an the NEPA altogether because of the self evident proposition that "NHPA and NEPA, by their very language, impose no duties on the states and operate only upon federal agencies." *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) ("*Ely* I"). *See Ely v. Velde*, 497 F.2d 252, 257 (4th Cir. 1974) ("*Ely* II") (stating that a state may renounce federal funds, return the funds, proceed with construction without the

assistance of the federal agency, and avoid the NHPA and the NEPA).

In conclusion, if I am in error about federal involvement with the railroad tracks, the sewer and the parks, there is still no evidence involving the ODF, or ConAgra, with federal licenses, permits, approvals, assistance, undertakings, or actions respecting Jobbers Canyon which would justify a federal agency, or this court, in taking any action which would enjoin the ODF, or ConAgra, respecting the demolition of the Canyon.

VII.

I make the following general observations and findings. First, exhibits which I received on condition, subject to my review, are now admitted for whatever value they may have, if any. Second, the plaintiffs and the intervenor have informed my that two issues remain to be resolved: (1) are there private "sub rosa" agreements which would implicate the NHPA, and NEPA, or the LWCFA; and (2) is the title to Central Park East defective, resulting in a LWCFA conversion? The first issue is not subject to resolution by summary judgment, but the second issue is, according to the parties. The defendants inform me that three additional issues remain, if this case is not dismissed: (1) whether the plaintiffs and the intervenor have standing; (2) whether the Trust has the capacity to sue in this case; and (3) whether all indispensable parties are before the court. The parties inform me that these issues can be resolved by summary judgment or other dispositive motion. Accordingly, by separate order, I will

schedule motions for summary judgment, other dispositive motions, and limited discovery, and set forth methods for resolving the remaining issue not subject to summary resolution. I suggest that the court not enter judgment on these findings and recommendations until such time as all remaining issues have been resolved. Next, I have taken under advisement the various oral motions to dismiss, and will keep them under advisement until the remaining issues can be addressed. Finally, trial of the limited issues set forth herein was held pursuant to the provisions of Fed. R. Civ. P. 42(b) (providing for separate trial of separate issues), and I find that such procedure was necessary in furtherance of the convenience of the parties, to avoid prejudice, and to expedite this case.

IT IS THEREFORE RECOMMENDED TO THE HONORABLE WARREN K. URBOM THAT THE COURT:

1. enter judgment, on the limited issues, for the defendants and against the plaintiffs and the intervenor, finding that:

a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA;

b. insofar as the ODF and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the NEPA or the LWCFA) could not

result in a federally required retention of one or more buildings in Jobbers Canyon;

2. withhold entry of judgment on these findings and recommendations until all other issues identified in section VII of these findings and recommendations have been resolved.

DATED this 28th of July, 1988.

/s/ Richard G. Kopf
Richard G. Kopf*
United States Magistrate

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*I make two personal observations. First, I have not intended to, and do not express any personal opinion as to whether the Canyon should be demolished. Second, counsel for all parties are complimented for their assistance to me in resolving these difficult issues on an expedited basis. In particular, the candor, good humor, courtroom decorum, and legal analysis of Mr. Achelpohl are admired and appreciated by me.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD), et al., Plaintiff, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION, et al., Defendants.	CV88-0-247 MEMORANDUM AND ORDER ON PLAINTIFFS' AND INTERVENOR'S OBJECTIONS TO THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS FILED DEC 30 1988

On May 26, 1988, I assigned this case to Magistrate Richard G. Kopf as master, filing 108. He conducted a hearing on many of the issues in mid-July and issued his findings and recommendations to me on July 28, 1988, filing 261. The plaintiffs and intervenor objected to many of the findings of fact and conclusions of law. The defendants responded to those objections. Following oral arguments, I took this case under consideration.

Under Fed. R. Civ. P. 53(e)(2), when an action is tried to a master without a jury, "the court shall accept the master's findings of fact unless clearly erroneous." I have reviewed the transcript and the evidence from the magistrate's hearing. I shall proceed, page by page, through the magistrate's findings and recommendations and address

the parties' objections as they arise. My conclusions follow.

EXHIBIT 217G

One of the plaintiffs' and intervenor's most strenuous objections is to the magistrate's refusal to consider Exhibit 217G, the current grants manual of the National Parks Service. The magistrate sustained an objection to the offer and I agree with his determination that there is no evidence from which he could conclude that the parties to the contract intended to give the Federal Parks Service unilateral authority to amend the contract by revising the manual. Transcript at 780. The magistrate's determination is supported by Kenneth Compton's testimony, transcript 336:23-338:4, by Oliver Wolff's testimony, transcript at 541:19-25, and by Exhibit 2018.

The plaintiffs and intervenor also content that the grants manual should have been received into evidence to show an evolving standard of care to which the Park Service should be held, transcript at 398-99, or that it should have been received as "a statement by a party." Transcript at 990. The magistrate gave the parties sufficient opportunity to make arguments supporting their offer but he concluded that "they failed to set forth any logical reason" for the court to receive the evidence. I am inclined to agree with the magistrate. The manual is not law and there is no evidence to show that it reflects a legal standard of care for Park Service employees.

ICC INVOLVEMENT

The magistrate's analysis then turns to the issue of the Interstate Commerce Commission's involvement in the project. The magistrate relied on *Simmons v. I.C.C.*, 808 F.2d 22, 24 (7th Cir. 1986), which involved a pooling agreement wherein one railroad agreed to handle another railroad's cars over a 15-mile stretch of the first railroad's line and the other railroad agreed to stop using a portion of its line. The *Simmons* court held that the Commission did not require the railroad to submit an abandonment application in addition to a pooling agreement application where service to an area had not been affected.

The magistrate found that the evidence showed that 1) the portion of the "side hill lead" that was removed was known as an industrial track, 2) the trackage was located solely in Nebraska and 3) the shippers' service was not interrupted by the removal of the trackage. Relying on *Simmons*, the magistrate determined that the "[r]elocation of 'industrial' tracks, within one state, where shippers continue to receive service, does not require a license or permit or approval form the ICC." *See* magistrate's Findings and Recommendations ("MFAR") at 28.

I do not agree that *Simmons* helps to resolve the issues presented here because the railroads in *Simmons*, prior to the litigation, had sought and obtained the ICC's approval over their pooling agreement. *Simmons*, at 23. Though the *Simmons* court mentioned the exception of 49 U.S.C. § 10505 in the opinion, *id.*, the court did not invoke it to reach its holding. In any event, section 10505 apparently requires that the Commission determine whether a specific transaction is exempt under that provision upon

application of the railroad. No such determination has been made on these facts and the evidence presented at trial established that neither the Union Pacific nor Burlington Northern submitted an application for approval of the activities related to the tracks in question. Exhibit 2022.

In addition to his discussion of *Simmons*, the magistrate also noted that 49 U.S.C. § 10907(b)(1) does not require ICC approval for an abandonment of trackage such as the small section of Union Pacific's side hill lead. I agree with the magistrate's conclusion, albeit for different reasons. The objectors contend that 49 U.S.C. § 10903 controls the abandonment issue and that 49 U.S.C. § 11343(a)(6) controls the joint use agreement issue.[1] Given their objection, I shall explain how I arrive at the same result as the magistrate with regard to the abandonment issue.

Section 10907 provides, in part:

> (a) . . . [W]ithout the approval of the Interstate Commerce Commission, a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may enter into arrangement for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

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[1] Section 10903(a) states that a rail carrier may abandon its lines or discontinue use of any part of its lines only after the Commission finds that the present or future public convenience and necessity require or permit such action. Section 11343(a)(6) requires that any transaction involving joint use of a railroad line may be carried out only with the approval and authorization of the Commission.

> (b) The Commission does not have authority under section 10901-10906 of this title over (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located or intended to be located entirely in one State.

I shall begin my review of these issues by considering the magistrate's reliance of section 10907. As I analyze the possible exceptions to Commission's involvement under 49 U.S.C. § 10907, two issues surface: first, whether the Commission must approve or permit the abandonment of the one-half mile of the "side hill lead" trackage; and second, whether the Commission must approve or permit the agreement between the Union Pacific and the Burlington Northern for joint use of the Burlington's trackage. To answer either question, I first must determine whether the pertinent portions of trackage constitute "spur, industrial, team, switch or lead" trackage or regular line trackage.

Case Law

My research reveals that whether the track is "spur, industrial, team, switch or side" is a mixed question of fact and law, the answer to which turns on the uses, or intended uses, to which the track is put. *See Railway Labor Executive Ass'n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988); *Illinois Commerce Comm'n v. United States*, 779 F.2d 1270, 1271 (7th Cir. 1985); *Nicholson v. I.C.C.*, 711 F.2d 364, 367 (D.C. Cir. 1983).

Two cases illustrate the direction of the court's analysis under section 10907. In *Nicholson v. I.C.C.*, 711 F.2d

364, 367 (D.C. Cir. 1983), the court drew upon a few relatively old cases to describe the difference between tracks exempt under section 10907 and regular railroad line. I quote extensively from that opinion:

> [I]t is sufficiently plain, from a consideration of not only the obvious purposes prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that Congress intended to subject to the requirements of [section 1(18)] so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all that mass of 'tracks' . . . naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923). . . . Shortly thereafter, the Supreme Court held that

> [i]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes and extension of the railroad within the meaning of [section 1(18) of the Act], although the line be short and the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278, 46 S.Ct. 263, 266, 70 L.Ed.578 (1926).

Nicholson, 711 F.2d at 367-68. (emphasis omitted).

The Fifth Circuit has described the difference between regular line and the exempt trackage:

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad, or extension thereof" and there can be no abandonment of such trackage without obtaining a certificate of public convenience from the . . . Commission. If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side.

New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966). The Seventh Circuit in *Illinois Commerce Comm'n v. United States*, 779 F.2d 1270, 1273 (7th Cir. 1985), referred to the *New Orleans* case and stated its belief that the case did not stand for the proposition that *every* track used in actual transportation haul from shipper to consignee was regular line. The Seventh Circuit noted that even the tracks that are used to load and unload goods are necessarily used in the actual transportation haul, but it is widely agreed that such tracks are exempt. Mindful of the guidance provided in these other circuits, and cognizant of the Commission's decision of *Sacramento Northern Railway Trackage Rights*, 290 ICC 145, I shall consider the uses to which the Union Pacific's and Burlington's tracks were put to determine if the magistrate's conclusion was accurate under the law.

Abandonment of Half-Mile

The plaintiffs and intervenor object to the weight given to the testimony of Dennis Duffy. Duffy, the Superintendent of Transportation Services for the Union Pacific in Nebraska, stated in response to questioning by the magistrate that the "side hill lead" was an "industrial" track. Duffy testified that the side hill lead provided "access to an industrial area via the railroad" and that trains had used the lead to run to the Gibson yard in north Omaha.

He stated that the lead ran along a portion of the main line and down from 19th or 20th street to 5th and Jones. The only segment of the track that was "abandoned" ran from approximately 10th to 5th streets. The portion of the lead that remains will continue to be used to service customers. He explained that the cars that traveled over the tracks were collectively referred to as "transfer jobs" and that the cars serviced customers as often as daily and as seldom as three times per week, making only one trip per day.

It is apparent from Duffy's testimony that the segment of the side hill lead that must be taken up in order for the development to progress is not a "line[ ] designed and used for continuous transportation services by through, full trains between different points of shipment or travel." Rather, the tracks were "necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for," through transportation by full trains. Based upon the description of the trackage and its usages, I conclude that it is "industrial". Given that the

abandoned trackage was industrial, and because the entire segment was within Omaha, Nebraska, I find that under section 10907(b)(1), the Union Pacific was not required to seek the ICC's permission to abandon it.

The objections to the weight given Duffy's testimony are not well-founded.

Joint Use Agreement Trackage

I am troubled by what I see as the magistrate's failure to consider whether the railroads should have obtained I.C.C. approval over their joint use agreement. I disagree with his use of *Simmons* to resolve this issue, because, as I pointed out previously in this memorandum, the railroads in *Simmons* obtained approval of their pooling agreement. I conclude that a separate finding as to whether the portion of trackage that is the object of the joint use agreement is exempt is warranted.

Little information was elicited at the trial about the nature of the trackage that is the object of the joint use agreement. The agreement itself states that:

> Burlington and Pacific each have separate lines of railroad that cross at grade in the so-called Lower Yard area near Fifth and Howard streets, Omaha, Nebraska; and . . .
> [A] land clearance program to provide space for development of ConAgra's headquarters facility will necessitate removal of Pacific's access track to the so-called Lower Yard area and Pacific desires to obtain an alternate access route by use of certain Burlington trackage.

Duffy testified that, under the joint use agreement, the Union Pacific will use the Burlington's track for their

transport jobs by catching the Burlington line directly across from the Missouri River bridge. The portion of jointly used tracks will take the transfer jobs to the Gibson yard and then go north to 5th and Jones where Union Pacific will catch its own trackage along the riverfront. Based on Duffy's testimony and the description of the use of the trackage in the agreement, I find that the tracks are "incidental to the receipt of shipments by the carrier or their delivery to the consignee" and, therefore, industrial. Accordingly, the joint use agreement falls within the exemptions of section 10907(a). The results that I reach here do not contradict the result reached by the magistrate.

CORPS OF ENGINEERS
LaRandeau's Testimony

The plaintiffs and intervenor apparently do not take exception to the magistrate's reliance on the testimony of John Morton, chief of the regulatory branch of the Omaha Division of the Corps, who stated that the developers were not required to obtain section 404 or section 10 permits from the Corps. There was objection, however, to the portion of the magistrate's report that analyzed the testimony of John LaRandeau. The magistrate accurately reported that "Mr. LaRandeau testified that his office . . . could require the city to submit any plans for realigning the sewers or other structures to his office for design approval *if* the City wanted the sewer or other structure to interface with the levee, but this authority was expressly limited to the levee right-of-way." MFAR at 30.

The plaintiffs' and intervenor's primary objection is that the limitation on the Corps' approval power that was

reflected in the magistrate's summary of LaRandeau's testimony is legally inaccurate. They argue that 33 C.F.R.208.10(a)(5) establishes that the Corps' approval authority is not limited solely to the levee right-of-way.

The regulation states:

> (5) No improvement shall be passed over, under, or through the walls, levees, improved channels or floodways, nor shall any excavation or construction be permitted within the limits of the project right-of-way, nor shall any change be made in any feature of the works without prior determination by the District Engineer of the Department of the Army or his authorized representative that such improvement, excavation, construction, or alteration will not adversely affect the functioning of the protective facilities.

Id. The plaintiffs and intervenor contend that the pressurized sewers and pumps are "features" of the flood control system or "works" and that the city may not alter them without first obtaining approval from the Corps' District Engineer that the alteration will not adversely affect the functioning of the levee, a "protective facility."

I observe prefatorily that the magistrate's reference to LaRandeau's "office" was to the Missouri River project office, not the office of the Corps of Engineers. The Missouri River project office is responsible for the supervision, operation and maintenance of the levee. LaRandeau testified that his office does not issue permits or licenses, but that his office had the right under certain circumstances to request information from sponsors about any "improvement, excavation, construction or alteration" that would affect the functioning of the protective facilities.

LaRandeau testified that "[t]he levee system itself is a protective facility," transcript at 957-58, and that his office's authority to make a "determination" extended to plans that would affect the pressurized sewers. Transcript at 963. He explained that when he receives information from a sponsor, the district engineer determines whether the modification will have an adverse impact on the floodwall. This determination is then sent to the sponsor. However, he admitted that the only enforcement authority possessed by his office is that of "gentle persuasion" which, he conceded, was the equivalent of no authority. Transcript at 985. This testimony diminishes the significance of provision 10.7 of the Operations and Maintenance Manual for the Omaha Flood Control Project which states that "[n]o surface drains, sanitary sewers or drainage facilities of any type shall be connected to the pressurized sewers without the approval of the District Engineer."

Though the Corps may have the right to demand to see the plans, this alone does not give the Corps control or responsibility over the project. Upon consideration, I find that the regulations require the Corps to make a determination that LaRandeau stated was ordinarily in the form of a letter. This determination is significantly different, I believe, from being directed to obtain approval. I conclude that the authority of LaRandeau's office, to the extent that it is required to make a determination, does not amount to approval power because it is, in fact, without the teeth of enforcement. Thus, I hold that the Corps is not involved in any meaningful way in the project and that the result reached by the magistrate was proper.

The objectors also note that whether the sewer realignment would increase the effluent discharge into the river is irrelevant and that the magistrate was wrong in concluding that the effect of the realignment is that only the "internal connects" would be changed, causing no material change to occur to the distribution system of the river. Given my immediately preceding finding, I conclude that these issues are not material to the discussion.

FEDERAL INVOLVEMENT UNDER THE NEPA AND NHPA

As was stated in the magistrate's report, compliance with the NEPA is required when there is a "major federal action that significantly affects the human environment" and compliance with the NHPA is required only when there is "a proposed Federal, or federally assisted undertaking." With this in mind, the magistrate observed that, even if a determination was made that the ICC was involved in some way in approving the railroads' activities, there was no evidence to demonstrate that its involvement would be to an extent that required NHPA or NEPA compliance covering the area of Jobber's Canyon. he stated:

> [E]ven if the ICC were or should be involved in some way, which at this point is gross speculation, on the record before me there is no evidence to conclude that, (a) such federal action would be a legal condition precedent to the implementation of the entire project, or, (b) that the ICC could exercise such factual control over the "federal portion" of the project that the ICC

> would be required to consider project-wide environmental or historic preservation issues, such as those relating to the Canyon.

MFAR at 28. The magistrate supported his conclusion with reasoning taken from *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) and *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980). The magistrate discussed *Ringsred* early in his report, which included citations to *Winnebago* where appropriate.

Using similar reasoning, the magistrate also asserted that even if he had concluded that section 404 or section 10 permits were necessary from the Corps of Engineers, the amount of the Corps' involvement would be insufficient to trigger NEPA or NHPA review. Though my previous conclusions technically make this discussion unnecessary, I shall comment upon the "Major Federal Action" issue for purposes of an appeal.

According to the plaintiffs and intervenor, the magistrate's reliance on *Ringsred* and *Winnebago* is misplaced. They contend that the two Eighth Circuit cases improperly divorce the major federal action requirement from the inquiry into the significance of the impact on the human environment. The objectors indicate that the magistrate should have followed the Eighth Circuit's approach in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974), and should have adopted the reasoning of *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985). I am not convinced by the plaintiffs' and intervenor's argument that *MPIRG* and the subsequent Eighth Circuit cases are at odds. I shall explain.

Reconciling MPIRG

In *MPIRG*, college students filed suit to fight the sale of timber in the vicinity of the Boundary Water Canoe Area. The Eighth Circuit identified the threshold question as whether there was major federal action requiring NEPA compliance. The Forest Service contended that the project involved no major federal action and, having failed to meet the first portion of the NEPA test, that it had no obligation to issue an environmental impact statement ("EIS"). The court determined that it had the power to review the Forest Service's decision to refrain from issuing an EIS against a reasonableness standard.

The *MPIRG* court rejected the defendants' position that the NEPA required a bifurcated test. The court stated:

> To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act. . . . By bifurcating the statutory language, it would be possible to speak of a "minor federal action significantly affecting the quality of the human environment" and to hold NEPA inapplicable to such an action.

Id. at 1321-22. The Eighth Circuit reasoned that if there was "a significant effect" on the environment made by the federal actions, then the intent of the NEPA was that the project undergo detailed analysis.

In analyzing the federal involvement, the court observed that the Forest Service approved locations for logging roads, camps and buildings, that it marked trees to be cut, and that it negotiated payments. Further, the

court found that the Forest Service granted extensions in six of eleven active timber sale contracts and that it had entered into agreements that modified seven others. It also noted that the Forest Service had been significantly involved in the sales of timberlands and the money that the Forest Service received from the sales was inadequate to insure reforestation.

The court also considered the severity of the impact on the environment in determining whether to require NEPA compliance. In so doing, the court noted that an indirect effect was the detriment to the "existence value" of the forest. Direct effects included the excess nutrient run off from logging, the erosion and water pollution caused by logging, and the impact that forest destruction would have on education, scientific experimentation and recreation. Based on all of these considerations, the court concluded that there was "Major Federal action significantly affecting the quality of the human environment" and that required an impact statement.

The plaintiffs and intervenor contend that Magistrate Kopf dissected the issue of federal involvement from the significance of the impact of that involvement in a way that was rejected by the *MPIRG* court as illogical. I disagree.

Ringsred and Winnebago

The federal government's involvement in the project at issue in *MPIRG* was obvious. Likewise, in both *Ringsred* and *Winnebago*, there was no question that the federal government was involved, albeit in a relatively minor way, in some portion of the project. However, in *Ringsred*

and *Winnebago*, the Eighth Circuit analyzed two main issues to reach the conclusion that the projects lacked sufficient federal involvement to require project-wide compliance with the NEPA. First, the court studied the federal agencies' statutory duties to determine whether federal action was a legal condition precedent to the commencement of the project. In both cases, the court found that federal action was not statutorily mandated and therefore was not a legal condition precedent to the projects.

The court next applied a three-part test to determine whether the factual veto power of the federal government agency constituted federal involvement in the project necessary to comply with the NEPA. The Eighth Circuit considered three factors: 1) the degree of discretion exercised by the agency over the federal portion of the project; 2) whether the federal government had given any direct financial aid to the project; and 3) whether the overall federal involvement with the project was sufficient to turn an essentially private action into federal action. After analyzing the facts particular to each case in conjunction with the three factors, the court concluded that the factual veto power did not constitute the necessary involvement in the projects. Thus, the court found that the agencies' actions did not require project-wide review under the NEPA. *See Winnebago* at 272-73; *Ringsred* at 1308.

Rather than relying upon *Ringsred* and *Winnebago*, the plaintiffs and intervenor urge the court to adopt the reasoning of the district court in California from *Colorado River, supra*. The *Colorado River* court criticized the *Winnebago* court insofar as the Eighth Circuit decided that

"major federal action" is an element that must be met to trigger NEPA and that "major federal action" has significance independent from the impact affecting the quality of the human environment. The court found that the *Winnebago* court's construction of the NEPA was incongruous with Congress' intent under the NEPA. *Colorado River,* 605 F. Supp. at 1430-31. The *Colorado River* court stated that "[i]f substantial questions are raised whether a project may have a significant effect on the human environment, an EIS *must* be prepared." *Id.* at 1430 *quoting Foundation for North American Wild Sheep v. United States,* 681 F.2d 1172, 1178 (9th Cir. 1982). The court also stated that "[t]he Federal Defendants are in error when they contend that because there was minimal federal involvement, there was no need to examine each and every effect, direct or indirect, 'on site' or 'off site'." *Id.* at 1433.

Inasmuch as I am urged to follow the reasoning of *Colorado River,* I note, once again, that this court is bound by the law in the Eighth Circuit. Thus, the magistrate's focus on Eighth Circuit case law was appropriate and necessary.

The plaintiffs and intervenor also urge the court to consider the regulations that are intended to guide in the interpretation of the statute. 40 C.F.R. §1508.18 states, in part:

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.

Id. I have considered this regulation and I have no trouble stating that the Eighth Circuit's approach to the NEPA is

in line with the regulations. The regulation defines "major federal action" as an action having two features: the action must produce effects that may be major and the action must be potentially subject to federal control and responsibility. I interpret the references to major federal action in *Ringsred* and *Winnebago* to include all necessary elements under the NEPA standard.

Based on these four cases and the regulation, I make the following observations. The main concern of *MPIRG* was that the test under the NEPA be considered as an integrated whole, according to which federal involvement *and* the significant effects on the environment must be considered. The *MPIRG* court's reasoning is in harmony with the regulation. The later Eighth Circuit cases, *Ringsred* and *Winnebago*, do not sever the NEPA's standard for compliance into two tests. Rather, the cases represent the court's attempt to define the extent to which the NEPA requires compliance in nonfederal portions of fundamentally nonfederal projects.

The *Ringsred* and *Winnebago* cases indicate that a court in the Eighth Circuit must consider under the NEPA whether the actions at issue are potentially subject to federal control and responsibility. To aid in the decision of this issue, the Eighth Circuit states that the court must consider the existence of a legal condition precedent and three other factors determinative of de facto control. Additionally, *Winnebago* established that the completion of the nonfederal aspects of a single project does not constitute a secondary or indirect effect of federal action. *Winnebago*, 621, F. Supp. at 273.

The Eighth Circuit has acknowledged that it would be an unreasonable burden to expand the scope of a federal agency's responsibilities under the NEPA to include projects over which the agency lacks sufficient control or responsibility. *Ringsred*, 828 F.2d at 1309. I believe that this is a wise qualification to impose upon agency power. Accordingly, I conclude that the magistrate's use of *Ringsred* and *Winnebago* was proper. Under the Eighth Circuit precedents, I find no problem with his alternative legal reasoning regarding whether the I.C.C.'s involvement and the Corps of Engineers' involvement would constitute potential federal control or responsibility that warrants NEPA compliance. This same analysis applies to the involvement of the federal government under the NHPA's "federal undertaking."

NHPA Analysis

The plaintiffs and intervenor take exception to the magistrate's use of the word "attempts" in his statement regarding the purpose of the NHPA.[2] I see no value in quibbling about his choice of the word "attempts." Clearly, the magistrate did not intend to diminish the importance or relevancy of the NHPA, as is demonstrated by his analysis of the federal involvement issue. The primary complaint of the plaintiffs and intervenor is that the magistrate did not apply the standards outlined in the

[2] The magistrate wrote, "Section 106 of the NHPA, 16 U.S.C. (470f, attempts to afford the Advisory Council the opportunity to comment on federal undertakings which might impact upon historical properties." MFAR at 8.

current grants manual that refer to historic properties and that the magistrate did not give sufficient reasons for rejecting the reasoning of the *Colorado River* court.

To the extent that the objections go to the magistrate's failure to consider the current grants manual, I refer the parties to the beginning pages of this memorandum. The plaintiffs and intervenor would also have me consider Exhibit 247 and the deposition testimony of Dr. King. The exhibit states that "[i]f NPS has sufficient jurisdiction to . . . object, identify, insist, and require, it surely has sufficient jurisdiction to justify compliance with Section 106." Exhibit 247, however, references Exhibit 241, the letter written by Compton, the tone of which was later diluted by Compton at trial. I find nothing to indicate that the magistrate's decision not to rely on 247 and the deposition testimony of Dr. King was clearly erroneous.

Further, I find that the magistrate's failure to consider the *Colorado River* decision was understandable based on the magistrate's analysis of the *Ringsred* decision. It seems apparent that he followed the reasoning of that court to resolve the NHPA issue: "since there was a lack of significant federal involvement for NEPA purposes, the project was not an "undertaking" for *NHPA* purposes." MFAR at 19. I cannot say that his conclusions regarding the NHPA are clearly erroneous, because the magistrate had already analyzed and concluded, as I do here, that there was insufficient federal involvement in the project to require compliance with the federal statutes.

PARK SERVICES ISSUES
Contract Documents

The plaintiffs and intervenor initially contend that the magistrate failed to consider the project proposal as part of the basic contract between the United States and the State. The magistrate acknowledged that page one of the basic contract stated that certain attachments were incorporated into the agreement by reference, including "1. General Provisions dated Dec. 1965 [and] 2. Project Proposal." The magistrate found that nothing clearly intended to constitute the "Project Proposal" was attached to the basic contract. The magistrate also identified the Project Scope (Description of Project), as three paragraphs on page one of Exhibit 217, and implicitly determined that it should serve as the basis for the "Project Proposal." MFAR at 36-37.

The objectors argue that the magistrate found that pages 8-10, 12-16, 22-28, 35-40, and 88-90 of Exhibit 217 were required as part of the project proposal and application. In fact, the magistrate stated that Kenneth Compton had testified that these documents were required as part of the application. This requirement does not transform the documents into the "Project Proposal." Moreover, they cite to neither testimony nor documentary evidence to demonstrate that the documents that they assert constitute the "Project Proposal" are the project proposal.

The magistrate expressly stated that he heard no testimony, other than that of Compton and Wolff, that explained which documents constituted the contract, and from their testimony he could not define the project proposal. His finding that the three paragraphs on page one of the basic contract sufficiently described the project

proposal shall not be disturbed unless clearly erroneous. Given the description, "Project Scope – Description of Project" that is written above the three paragraphs on page one of the contract, and after considering the testimony of Compton and Wolff, I find no basis for overturning the magistrate's finding in regard to the contents of the contract.

Acquisition or Development

The objectors also contend that the magistrate was wrong in finding that federal funding assisted only in "the acquisition of 4.2 acres of land east of the Central Park Mall near the Missouri River." MFAR at 37. The plaintiffs and intervenor concede that the federal funding was used only for stage one, but they contend that the expenditures made pursuant to stage one included expenditures for the planning and development of the open public use area, if not the park. Assuming that there was development, then they argue that the general conditions of the contract required approval of the development plans. The plaintiffs and intervenor have referred me to the testimony of Wolff.

After reviewing Exhibit 231, the final audit, Wolff stated that some of the listed payments to HDR were made for development activities and other were not. He also stated that federal money was used to pay for some construction and engineering plans. Wolff stated that site clearing and grading were development functions and it is apparent from the audit that Anderson Excavating and Wrecking, and Negus Sweenie, Inc. perform those services. Counsel for the plaintiffs asked whether, prior to

the sixth amendment to the contract in 1986, *see* Exhibit 217F, the project was an acquisition and development project. Wolff answered that it was. Further evidence offered in support of the objectors' argument is that the Federal Assistance Forms submitted to the Park Service with the original application and all amendments thereto, referred to "Acquisition, Development and Planning." Based on this evidence, the objectors contend that the magistrate's finding that the development was "unassisted" and "nonfederal" are clearly erroneous, and that the conclusion that the project was closed out as an acquisition project is unfounded.

In addition to relying upon the description in the first paragraph of the Project Description portion of the contract, the magistrate noted that "[t]he final amendment to the project, (Exhibit 217F), made it clear that development was not part of the project: 'When acquisition was complete, there weren't funds available to do the stage II development items." MFAR at 53. I note, too, that when asked about the state of the dedicated land upon completion of stage one, Wolff stated:

> A: [The land] "was clearly identified as a public use area.
>
> Q: But it hadn't been developed as a park?
>
> A: Right.

Additionally, Exhibit 218K says that the application for the original $300,000 was for the land acquisition only.

Based on the description in the contract and on Exhibit 217F the magistrate determined that the project was properly closed out as an acquisition project and, concluded, therefore, that the "general conditions" regarding

development and approval of development plans were a nullity. Accordingly, there was no need to obtain approval of plans when the park was developed, and thus, no need to get a section 106 review.

This issue appears to me to be much closer than the magistrate's report reflects. Considering Wolff's testimony, it may well be that certain development activities were undertaken by HDR and others prior to 1986 and that none of the plans for the development activities were approved. The problem that I see with the objectors' argument is that they failed to establish which payments were made to HDR, Negus and Anderson for which activities.

The final audit, Exhibit 231, reflects that between 1978 and 1984 approximately $312,919.63 was paid over several years to HDR, approximately $31,857 was paid to Negus and that approximately $44,110 was paid to Anderson, totalling approximately $388,886.63. This amount is greater than the state portion of the project cost by roughly $13,886.63. Based on Wolff's testimony and a strict interpretation of the Term "development", it may well be that development activities were undertaken pursuant to stage one without the appropriate approval. However, given the inability of Wolff to state how much of the payments were made for development and what was spent strictly on acquisitions, I cannot conclude that the magistrate's conclusion is clearly erroneous.

Conversion of Use – Basis of Original Funding

The plaintiffs and intervenor contend that the parties to the redevelopment agreement have permitted a

conversion of the use of the park land without first obtaining the approval of the director of the Parks Service. The conversion, they argue, is apparent because the 1983 plans were different in material respects from the plans in the application for the original funding. They rely on Exhibit 304 and upon Dr. Buchanan's testimony to demonstrate the inconsistencies between the 1983 plans and the basis for original funding.

While it is true that Exhibit 304 indicates that several portions of the project were completely revised under the 1983 plan, the extent and nature of the revisions are not plain from the exhibit. Revisions do not automatically correlate into inconsistencies. Thus, I find no reason to conclude that these revisions are inconsistent with the basis for the original funding.

Additionally, the plaintiffs and intervenor criticize the magistrate's reliance on Buchanan's characterization of the project as a "continuum" and argue that the magistrate should have put more weight on other portions of Buchanan's testimony. They assert that King's testimony and Exhibit 241, the letter written by Compton enumerating his concerns about the project, should have been given more weight, and that Compton's testimony at trial should have been given less weight. I observe that the magistrate heard the trial without the aid of a jury and, therefore, he was obliged to make determinations as to the witnesses' credibility and the weight that should be accorded to the evidence.

One particular change about which the plaintiffs and intervenor object is that in the original application the park was to be used for active and passive recreation and

now the plan is for the park to accommodate only passive recreation. The objectors contend this difference constitutes a conversion of the use of the land that requires the approval of the NPS director. *See* 16 U.S.C. §460*l*-8. The plaintiffs and intervenor point to 36 C.F.R. 59.3(d) and the current grants manual to establish the distinction between active and passive recreational uses. The regulation states, in part:

> A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would . . . require NSP review and approval.

This provision, however, does not help me to define passive and active recreational uses. The plaintiffs and intervenor have not demonstrated that the magistrate's reliance on Martin Shukert's testimony about passive and active uses was clearly erroneous. Therefore, I shall not disturb the magistrate's finding that the "passive" limitation does not contravene the original basis for the funding and is not a conversion.

Conversion of Use – Lack of 6(f)(3) Boundaries

The plaintiffs and intervenor also contend that the failure of the developers to establish section 6(f)(3) boundaries amounts to a conversion because, without the boundaries, there is no way to determine whether a conversion has occurred. They object to the magistrate's report, which, according to them, concludes that section 6(f)(3) boundaries are not necessary. The magistrate made no such finding.

Rather, the magistrate determined that it was unnecessary for the parties to have a map or plat that illustrates that 6(f)(3) boundaries. He decided, based on the testimony, that the 6(f)(3) boundaries were set by the description of the land in the acquisition project contract, and the magistrate stated that "inasmuch as Compton was satisfied" with the boundaries, he was, too. The evidence supports his conclusion.

Alternatively, the plaintiffs and intervenor contend that the magistrate is precluded from finding that the 6(f)(3) boundaries were set, because there continues to be disagreement regarding the boundaries. They ask the court to consider Exhibits 235 and 244-244A relative to each other. These exhibits show that two different parties, at one time, disagreed on the placement of the boundaries. Compton, however, stated that until the State of Nebraska responds to his office and asserts that it believes that the boundary is different from the boundaries set by the description of the land acquired, then he is satisfied that the boundaries are established. Again, I have no basis for finding that the magistrate's findings are clearly erroneous.

Conversion of Use – Financing

An additional objection concerning the conversion issue requires that I analyze the method chosen by the county to finance the development project. The focus of the objections to the financing scheme is that the parties to the redevelopment agreement have failed to insure that the county will maintain sufficient control over the

project. The plaintiffs and intervenor rely upon a Solicitor's opinion that if it is possible for a state or political subdivision to forfeit its proprietorship of the LWCFA property, such would constitute a lack of control over the land and be considered a conversion under the Act. Based on that opinion, the plaintiffs and intervenors argue that under the documents comprising the basis of the project's financing, the county has exposed itself to the possibility of losing proprietorship and possession of the land and, accordingly, there has been a conversion under the LWCFA.

The magistrate determined that the Solicitor's opinion did not apply and provided five reasons for his conclusion. First, he found that the county was not a party to the trust indenture and that it did not pledge anything pursuant to the trust indenture. He recognized that the documents had to be read in conjunction with each other, but he concluded that only the ORDC pledged anything, and that was the revenue and income derived from the project. The real estate was not pledged. I agree with the magistrate's findings.

The plaintiffs and intervenor object to the extent that the indenture requires, in the event of a default, that the ORDC relinquish possession of the park land. However, I note that "possession" and "proprietorship," as was used in the Solicitor's opinion, have two different meanings. Moreover, I note that the Bank and the ORDC's are bound, by the terms of the trust indenture, to abide by the requirements of the redevelopment agreement. One part of the redevelopment agreement establishes that the county will have the sole control over design of the park.

The magistrate's second reason for finding that the Solicitor's opinion did not apply to the facts presented here was that even if the ORDC defaulted under the trust indenture, state law and a city ordinance are in place to ensure that the park would be operated for the use of the public as a park. His second reason ties into the magistrate's third reason: that the state statute and city ordinance constitute clear-cut provisions for the maintenance of county control over the park.

The plaintiffs and intervenor object to the magistrate's determination that Neb. Rev. Stat. 23-820 applies to the case. The Nebraska statute authorizes the county to "join with any other political or governmental subdivision, or with any agency, or public corporation" in the acquiring, holding improving and operating of any park. The plaintiffs and intervenors correctly point out that the ODF and ORDC are private corporations and therefore, the statute does not authorize the contract between the county and the private corporation. I agree that the statute is inapplicable. However, I find no reason to conclude that the statute's inapplicability completely undermines the magistrate's analysis.

I recognize that the plaintiffs and intervenor also objected to the magistrate's reliance on the city ordinance dedicating the land to use as a public park. They argue that the magistrate's reliance on the dedication is premature, since the dedication is valid only to the extent that the county had good title to the land when it was dedicated for park use. Considering that the magistrate accepted the ordinance into evidence and considering that the parties agreed to try the title issue separately, I am

not convinced by the plaintiffs' and intervenor's argument. I note that Neb. Rev. Stat. §23-3114 provides that the county board may enter into other contracts for authorized purposes. Additionally, Exhibit 207 states that the county will use the Project as a public park, and Exhibit 209, the ground lease, states that the corporation and county shall use the land only as a public park. For these reasons, I find no reason to decide that the magistrate's reliance on the ordinance and other documents was clearly erroneous.

Moreover, I find nothing clearly erroneous about the magistrate's conclusion that the argument regarding conversion based on the project's financing is speculative. There has been no default by the ORDC under the trust indenture yet. Until there is, there is no credible possibility of conversion. Given that the magistrate's findings regarding the financing scheme are not clearly erroneous, I shall overrule the plaintiffs and intervenors' objections.

Conversion of Use – Redevelopment Covenants and Park Covenants

The plaintiff and intervenor's final objection is to the magistrate's conclusion that the park covenants and the architectural review committee's control over the county does not constitute a conversion under the LWCFA. He reasoned that although the county is not a signatory to the redevelopment covenants, the redevelopment agreement states that the county is solely responsible for the park. The magistrate also found that, although the park covenant, which were signed by the county, require that the park design be consistent with the redevelopment

area, this covenant does not place the county at the mercy of the parties to the redevelopment agreement. He found that the PIP is the blueprint for the current plans and is the 1983 HDR plan. Given the testimony at trial that the current plans are a continuum of the 1983 plans, and that nothing significant has been altered, I cannot say that the magistrate's finding that the architectural review committee does not control the county's park design is clearly erroneous.

IT IS ORDERED that for all the reasons provided in this memorandum, the Plaintiffs' and Intervenor's Objections to the Magistrate's Findings and Recommendations, filing 268, are rejected and the Plaintiffs' and Intervenor's Motion to Reject the Magistrate's Findings and Recommendations, filing 269, is denied. I shall withhold judgment in the matter until all the issues are concluded.

Dated December 30, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	JUDGMENT
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES,	)	(Filed FEB 14 1989)
Intervenor,	)	
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	

For the reasons provided in the accompanying memorandum and my previous memorandum, filing 443,

IT IS ORDERED that:

1. the findings and recommendations of the magistrate, filings 261 and 449, are approved determining that:

   a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA or otherwise implicating the NEPA or the LWCFA;

   b. insofar as the Omaha Development Foundation and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the

NEPA or the LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon;

c. the National Trust for Historic Preservation in the United States has standing for itself and its members to bring this action;

d. People for Responsible Omaha Urban Development lacks standing for itself, but PROUD has standing for its members;

e. Roger Durand has standing;

f. Mercer Management Company has standing for itself;

h. the court has before it appropriate parties such that adequate relief can be provided by the court;

2. the National Trust for Historic Preservation in the United States has capacity to sue the federal defendants and the nonfederal defendants;

3. all dispositive motions at any time made by any party and all motions for injunctive relief are denied;

4. plaintiffs' and intervenor's motion for leave to supplement the record, filing 443, are denied; and

5. final judgment is entered in favor of the defendants and against the plaintiffs and intervenor.

Dated February 14,1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

United States Court of Appeals
For The Eighth Circuit

No. 89-1342NE	*	
People for Responsible Omaha Urban Development, et al,	*	
Appellants,	*	
National Trust for Historic Preservation,	*	Appeal from the United States District Court for the District of Nebraska
Intervenor Below,	*	
Appellant,	*	
vs.	*	
Interstate Commerce Commission; et al,	*	
Appellees.	*	

The injunction prohibiting demolition pending appeal is denied as to the Carpenter Paper Company Building and the Nogg Paper Company Building. Damages may be incurred by appellees with regard to contracts involving these two structures and appellants have indicated an inability to post security for such damages. An injunction prohibiting demolition of the John Day Company Structures (3), the Wright & Wilhelmy Building and the New Idea Building, pending an expedited appeal, is granted. The Clerk of this Court is directed to set this case for argument during the April court session and establish an expedited briefing schedule for the submission of this appeal.

Appellant's Brief	March 15, 1989
Appellee's Brief	March 29, 1989

Appellant's Reply Brief April 7, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand,

Appellants,

National Trust of Historic Preservation, Intervenor Below

Appellant,

v.

Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc.,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Filed: June 9, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ORDER

The injunction entered by this Court pending an expedited appeal of this case is dissolved.

An opinion will be issued later.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand,

Appellants,

National Trust of Historic Preservation, Intervenor Below

Appellant,

v.

Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc.,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: April 12, 1989
Filed: September 14, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

Plaintiff People for Responsible Omaha Urban Development (PROUD) moved in the District Court for a temporary restraining order to prevent the non-federal defendants from completing preparations for construction of the Riverfront Redevelopment project in downtown Omaha. Although no federal funds, licenses, or permits were involved in the project, PROUD named three different federal agencies – the Army Corps of Engineers, the National Park Service, and the Interstate Commerce Commission – as defendants and based its claims on their alleged failure to comply with federal environmental statutes.

In April 1988, the District Court[1] denied a temporary restraining order and a preliminary injunction. In February 1989, the District Court entered its final judgment on the merits in favor of defendants. This appeal followed. Our Court granted a partial stay pending appeal. In June 1989, we dissolved the stay, and appellants' petition for a rehearing en banc of that order was denied.

Appellants' goal in bringing this lawsuit was to enjoin demolition and construction activities in an historic warehouse district known as Jobbers Canyon. At the time

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

this appeal was briefed and argued, of the original twenty-two buildings in Jobbers Canyon only five had not already been demolished. Although the non-federal appellees argue that the case therefore is moot, we do not address that question. Instead, we rest our decision on the same grounds that provided the basis for the decision of the District Court.

Appellants do not allege that any of the named federal agencies has licensed or funded any part of the Jobbers Canyon project. Instead, they argue they each gave or should have given approval to actions related to the project. The required approvals that appellants refer to, however, all relate to the development of Central Park East, which is a separate, county-sponsored project.

To show a basis for relief, PROUD had the burden of establishing that one or more federal agencies had sufficient control over the Jobbers Canyon project to bring the consultation and environmental review provisions of the National Historic Preservation Act and the National Environment Policy Act into play. *See Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980). The District Court found that no such federal control over the project exists. Specifically, the District Court found that (1) there is no federally assisted undertaking or major federal action in connection with the Jobbers Canyon project; (2) there is no federally assisted undertaking or major federal action which in any way affects Jobbers Canyon; and (3) there is no federally assisted undertaking or major federal action that, if enjoined, could prevent the non-federal defendants from demolishing Jobbers Canyon.

For reversal, appellants essentially restate the arguments that were rejected by the District Court in its thorough memorandum opinions as well as by the magistrate is his detailed analysis of the case. Having carefully considered these arguments, the opinions below, and the record in this case, we conclude that none of the District Court's findings of fact is clearly erroneous and that the court did not commit any error of law. None of appellants' arguments persuades us that any of the federal defendants has had that degree of *de jure* or *de facto* control over the Jobbers Canyon project necessary to trigger consultation procedures and environmental review under any of the federal statutes upon which appellants rely. Accordingly, the judgment of the District Court is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand, Appellants, National Trust of Historic Preservation, Intervenor Below Appellant, v. Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc., Appellees.	Appeal from the United States District Court for the District of Nebraska. CV-88-C-247

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

September 14, 1989

Appellees will recover from appellants the sum of $783.00.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED 10/30/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342-NE

People for Responsible Omaha Urban Development, et al.,	*	
Appellants,	*	Order Denying
vs.	*	Petition for
Interstate Commerce Commission, et al.,	*	Rehearing and Suggestion for Rehearing
Appellees	*	En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 20, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

v.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

NON-FEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's cause of action is moot.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by appellate standards of review.

3. Whether any of the reasons set forth in Rule 10 of the Supreme Court of the United States are present to warrant a review of this case.

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OPINIONS

Respondents accept the Opinions attached to Petitioner's Petition for Writ of Certiorari and contained in the Appendix attached thereto. Respondents also attach as an Appendix to this brief the Magistrate's Findings & Recommendations dated January 20, 1989, the District Court's Memorandum dated February 14, 1989, and the District Court's Order and Memorandum denying Motions for Temporary Restraining Order and Preliminary Injunction dated April 13, 1988 (See Appendix attached hereto).

STATEMENT OF THE CASE

This case involved a six block warehouse district located in a 113-acre redevelopment project (the "Redevelopment Project") located between the Missouri River and the center of downtown Omaha. The broad area from 10th Street on the west to the river on the east, and Douglas Street on the north to Jackson Street on the south, contain the project and its related environment. Going east to west one finds the following: the Missouri River, a federally controlled navigable river; the City's levee for flood control; the Union Pacific-Burlington Northern Railroad tracks; a large area of vacant and undeveloped land, part of which is owned by Douglas County and held for park purposes; and the former site of Jobber's Canyon located in a six-block area from 8th to 10th Streets and from Farnam to Jackson Streets.

The buildings in Jobber's Canyon, which were the subject of this litigation, originally consisted of 21 buildings, all of which have been demolished.

In January of 1988, the City of Omaha generated a Riverfront Redevelopment Plan which set forth the proposed redevelopment of separate parts of the area defined above. The plan envisioned the cooperative efforts of Douglas County, City of Omaha, Omaha Development Foundation ("ODF") and ConAgra in constructing a $280 million redevelopment project in downtown Omaha. The plan formed the basis for the Redevelopment Agreement, which represents the guidelines for the implementation of the Redevelopment Project. The Redevelopment Agreement defines the cooperative obligations of ConAgra, the City, the County, ODF and the Peter Kiewit Foundation with respect to the implementation of the Redevelopment Plan and concept. It is clear from the Redevelopment Plan and the Redevelopment Agreement that the Redevelopment Project was a local and cooperative undertaking.

In the Redevelopment Agreement, each party retained its independence to develop its separate project in a manner consistent with its legal obligations, prior commitments, and responsibility to its constituents. Nowhere in the Redevelopment Agreement does it set forth a need for or intent to obtain any federal funding or licensing. (Petitioner's Appendix, pp. 3-4). In fact, the parties to the Redevelopment Agreement testified that the Redevelopment Agreement did not call for, nor did it contemplate, federal involvement of any kind. (Petitioner's Appendix, pp. 3-4). The Redevelopment Agreement is the vehicle by

which the downtown redevelopment concept was accomplished by local political subdivisions, non-profit charitable corporations and private companies without any federal involvement or aid.

One of the projects carried out for the development was the demolition of 21 buildings located in Jobber's Canyon. The land in Jobbers Canyon was cleared and now contains a series of recently constructed buildings, owned and operated by ConAgra as its home offices.

Though the Redevelopment Agreement and Redevelopment Project did not call for nor require any federal funding or aid or permits of any kind (Petitioner's Appendix, pp. 3-4), Petitioner has attempted to prove federal involvement in connection with a flood wall located four blocks from Jobbers Canyon, a spur railroad track located one or two blocks from Jobbers Canyon and a county park, at the closest point across the street from Jobbers Canyon.

For instance, Petitioner attempted to show that a permit was needed from the United States Army Corps of Engineers since the Redevelopment Project contemplated that the City would reroute some of its own sewers. According to Petitioner's argument, since these sewers eventually lead to connections running under the levee originally built by the Corps of Engineers, a permit would be required from the Corps of Engineers before the City could reroute its own sewers. The court below affirmed findings of fact that the Corps of Engineers had no approval authority with respect to these sewers. (Petitioner's Appendix, pp. 28-31; 85-86; 115).

The Redevelopment Project also contemplated the relocation of some railroad side track to make room for additional development. Petitioner claimed that the re-routing of this railroad track would require approval from the Interstate Commerce Commission. The court below affirmed that the trial court's finding of fact that the "side hill lead" two blocks from Jobbers Canyon was an "industrial" track which could be relocated without ICC approval, and it was. (Petitioner's Appendix, pp. 26, 81; 83; 115).

Finally, Petitioner claims that the National Park Service was involved since Douglas County's park land was originally acquired partially with National Park Service money, and the park land had been converted and the contract for federal funds had been violated, among other things. The courts below affirmed findings of fact against Petitioner on all the issues relating to the park, which would require National Park Service approval for development and use of the park. (Petitioner's Appendix, pp. 31-68; 95-105; 115; Appendix attached hereto, pp. 78-112, 125-132).

Petitioner sought to enjoin demolition of warehouses in Jobbers Canyon. However, all Petitioner's claims and evidence related to places outside of Jobbers Canyon – a railroad "industrial" track; a city levee and seawall; and a county park. Petitioner sought to prove that changes in those areas under the Redevelopment Project in Omaha would trigger federal involvement and the requirement for federal control. However, even with respect to the places outside of Jobbers Canyon that Petitioner sought to establish federal control, Petitioner failed in its proof. The magistrate found, and the District Judge and Circui

Court affirmed the findings of fact that relocation of the "industrial" railroad track was not subject to I.C.C. approval (Petitioner's Appendix, pp. 26; 81; 83; 115); that the incidental changes in the City sewer system were not subject to Corps of Engineers' approval (Petitioner's Appendix, pp. 28-31; 85-86; 115); and that the development and completion of the County Park as projected was not subject to National Park Service approval. (Petitioner's Appendix, pp. 54; 115). On the basis of these findings, Petitioner has failed to lay a factual basis to present any legal issue to this Court, to say nothing of a legal issue creating a conflict between circuits or a conflict with decisions of this Court.

The profound "off-site impact issue" which Petitioner evidently seeks to raise does not exist in this case. There cannot be an off-site impact of federal inaction unless there is an on-site right for the federal government to act. The findings below are that the federal government had no control over the local action taken with respect to the railroad track, the sewers and the park.

Oblivious to the foregoing, Petitioner seeks to argue before this Court the off-site impact of the federal control, found not to exist, of the railroad track, the sewers and the park on the warehouses in Jobbers Canyon. Factually, the impact is none. Legally, it could hardly be more than that.

The National Historic Preservation Act, 16 U.S.C. § 470f ("NHPA") and the National Environmental Protection Act, 42 U.S.C. § 4332 ("NEPA") require consultation procedures and an environmental review only in the case

of a federally assisted undertaking (NHPA) or major federal action (NEPA), where the action may affect historic properties. Petitioner has pointed to nonexistent federal involvements as being federally assisted undertakings or federal actions implicating the NHPA and NEPA, despite the fact that there is no federally assisted undertaking or major federal action in connection with the activities carried out pursuant to the Redevelopment Agreement; there is no federally assisted undertaking or major federal action which in any way affects Jobber's Canyon; and there is no federally assisted undertaking or major federal action, which, if enjoined, could prevent ODF from demolishing Jobber's Canyon (which has long since occurred).

Petitioner twice requested the District Court to impose a preliminary injunction enjoining Omaha Development Foundation from demolishing Jobber's Canyon. On both occasions, the District Court denied this request (Appendix attached hereto, pp. 1-16; Petitioner's Appendix, pp. 106-107).

SUMMARY OF ARGUMENT

1. This proceeding is moot because there is no longer any case or controversy.

2. Petitioner has failed to show any facts indicating that the Redevelopment Project was a federally-assisted undertaking or major federal action implicating the NHPA or NEPA.

3. This proceeding is not proper for certiorari under U.S. Supreme Court Rule 10.

ARGUMENT

I.

MOOTNESS.

This action was instituted by Petitioner to enjoin the demolition of warehouse buildings located in a six block area in Omaha, Nebraska. The buildings have been totally demolished. As Petitioner referring to the warehouse buildings so aptly puts it: "Now nothing remains." Petition for Writ, p. 20. This case is moot.

This Court has uniformly refused to assume jurisdiction when a case is moot because no case or controversy exists under Article III of the United States Constitution. *North Carolina v. Rice*, 404 U.S. 244, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971); *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200 (1969); *Brockington v. Rhodes*, 396 U.S. 41, 90 S. Ct. 206 (1969).

The warehouse area which Petitioner sought to "save" has been completely demolished, replatted, regraded, redesigned and reconstructed into an office park consisting of five office buildings. No vestige, historical or otherwise, remains where the demolished warehouses once stood. Petitioner's action for an injunction to restrain demolition of the warehouses is moot.[1]

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[1] In two comprehensive decisions, the Magistrate found no evidentiary support for Petitioner's factual claims (Petitioner's App., pp. 1-73; Appendix attached hereto, pp. 17-114). On four occasions the District Judge found the same (Petitioner's Appendix, pp. 74-105; 106-107; Appendix attached hereto, pp. 1-16; 115-132). Similarly the Court of Appeals found

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the same (Per Curiam Opinion of Eighth Circuit Court, Petitioner's Appendix, pp. 112-15). Upon representations of counsel for Petitioner, including the National Trust for Historic Preservation, that they did not have funds for a bond, the Eighth Circuit Court granted a limited injunction without requiring Petitioner to put up a bond. (Order of Eighth Circuit Court, Petitioner's Appendix, pp. 108-109). Shortly after the Eighth Circuit Court's attention was directed to the fact that the National Trust had uncommitted assets in the amount of $18,000,000 (Omaha Development Foundation's Motion and Memorandum to Dissolve the Injunction Dated March 1, 1989, or to Require the Plaintiffs and Intervenor to Post a Sufficient Surety Bond, filed March 30, 1989, see Appendix attached hereto, p. 133), the injunction was dissolved (Order of Eighth Circuit Court, Petitioner's Appendix, pp. 110-111). Although there have been at least seven different determinations that Petitioner's cause of action below was without merit, Petitioner continues to harass Respondents. When the time to request certiorari from this Court was about to expire, counsel for The National Trust for Historic Preservation requested an extension of time to file its petition for certiorari. After The National Trust filed and received its Request for Extension, it declined to file a Petition for Certiorari (though PROUD did file its Petition). Counsel for Petitioner are well aware of decisions indicating that only federal agencies are subject to NHPA and not defendants like the City of Omaha, Douglas County, The Omaha Development Foundation and ConAgra. *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989); *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989). However, The National Trust, by requesting the extension to file, and PROUD, by filing the present Petition, continue to harass defendants and waste local taxpayers' (Omaha and Douglas County) funds by needlessly prolonging litigation which is not only frivolous, but moot.

II.

PETITIONER FAILED TO CARRY ITS BURDEN OF PROOF BEFORE THE DISTRICT COURT.

As the decisions of the United States Magistrate and District Court indicate, Petitioner failed to show any facts indicating that the Redevelopment Project was a federally assisted undertaking or major federal action implicating the NHPA or NEPA.

Before Petitioner could have shown that the demolition of Jobbers Canyon was a federally-assisted undertaking or major federal action implicating the NHPA or NEPA, Petitioner would have had to establish factually that the demolition of Jobbers Canyon was under the control of a federal agency because it was accomplished with federal funding or would have required, prior to demolition, some federal authorization, permit or license. The District Court correctly found there was no showing of any kind on the part of Petitioner that ODF was assisted in the demolition of Jobbers Canyon by federal funds or that ODF had to obtain some sort of federal authorization, permit or license to demolish Jobbers Canyon.[2]

---

[2] Petitioner has made several statements regarding agency control over the Redevelopment Project which Respondents perceive to be misstatements of law and fact. In its Petition, Petitioner claims that: (1) the federal agencies involved had approval power over the Redevelopment Project (Petition for Writ, p. i); (2) the abandonment of the Side Hill Lead and shared line agreement were subject to ICC approval (Petition for Writ, p. 12); (3) changes in the park design were subject to National Park Service approval (Petition for Writ, pp. 12-13);

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This factual determination by the District Court was upheld by the Eighth Circuit which said that none of the factual determinations made the District Court were clearly erroneous. This Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). *See also, Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924). Where the District Court and Circuit Court have reviewed the facts and reached the same conclusion, the Supreme Court will find no reason to review those facts itself. "A court of law, such as this Court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver, Inc. & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538 (1949); *Bereny v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 670 (1967).

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and (4) sewer lines could not be relocated without Corps of Engineers' approval (Petition for Writ, p. 13). However, the Magistrate and the District Judge ruled that: (1) there was no federal agency that had approval power over the Redevelopment Project (Petitioner's Appendix, pp. 72; 93; 94; 105; Appendix attached hereto, pp. 20; 113); (2) the abandonment of the Side Hill Lead and the shared line agreement were not subject to ICC approval (Petitioner's Appendix, pp. 26; 81; 83); (3) any changes made in the Park design were not subject to National Park Service approval (Petitioner's Appendix, p. 54); and (4) the sewer lines could be relocated without the Corps of Engineers' approval (Petitioner's Appendix, pp. 28-31; 85-86).

III.

NOT PROPER FOR CERTIORARI UNDER U.S. SUPREME COURT RULE 10.

Whether a review on writ of certiorari will be granted is controlled by U.S. Supreme Court Rule 10 which states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only *when there are special and important reasons therefor.* The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . .
>
> (b) . . .
>
> (c) When a . . . United States court of appeals has decided an *important question* of federal law *which has not been, but should be, settled by this Court,* or has decided a federal question *in a way that conflicts with applicable decisions of this Court.* [emphasis added]

1. No conflict of Circuit Court decisions.

Petitioner claims that the decision of the Eighth Circuit in this case conflicts with the following decisions from other circuit courts: *Morris County Trust for Historic Preservation v. Pierce,* 714 F.2d 271 (3rd Cir. 1983); *Sierra Club v. Hodel,* 848 F.2d 1068 (10th Cir. 1988); *Maryland Conservation Council v. Gilchrist,* 808 F.2d 1039 (4th Cir.

1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985); *Biderman v. Morton*, 497 F.2d 1141 (2nd Cir. 1974); and *WATCH v. Harris*, 603 F.2d 310 (2nd Cir. 1979).

Though Petitioner never articulates why there is a conflict between these decisions, it apparently believes that the Eighth Circuit's interpretation of the statutory term "federally-assisted undertaking" as it applies to nonfederal projects that require federal approval or licensing was too narrow as compared to these other Circuit decisions. Petitioner apparently believes that the Eighth Circuit was too restrictive when determining the extent to which federal agencies are required to consider indirect or "off-site" impacts of their actions under the NHPA and the NEPA.

Before analyzing these other Circuit decisions to show why they are entirely consistent with the Eighth Circuit's decision in this case, it is helpful to outline the general analysis developed by various circuit courts when assessing off-site impacts.

The best analysis so far of the extent to which an agency must consider off-site impacts of their actions was rendered in *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989). In that case, the court said an agency should *not* draw an analogy comparing environmental impacts to ripples following the casting of a stone in a pool. To do so would suggest that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. 884 F.2d at 400. The *Sylvester* Court said that a better image is that of scattered bits of a broken chain, some segments of which contain numerous

links, while others have only one or two. Each segment stands alone, but each link within each segment does not. If two separate portions of a project should be considered two links of a single chain, then the agency should consider the off-site impacts. However, if the two separate segments are not two links of a single chain, then the agency is not required to look to the off-site impact. 884 F.2d at 400.

The decision in this case, as well as previous Eighth Circuit cases, is entirely consistent with the *Sylvester* case. The Eighth Circuit previously ruled on the extent to which a federal agency must consider indirect or off-site impacts of their actions under the NHPA and NEPA. *See Winnebago Tribe of Nebraska v. Ray*, 620 F.2d 269 (8th Cir. 1980) and *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987). The *Winnebago* and *Ringsred* analysis is that in determining whether or not the NEPA or NHPA is implicated, one cannot look at the effect of the entire project on the environment, but only the effect of the federal portion of the project. If the federal portion of the project does not have an effect on the environment, then the Acts are not implicated. The analysis then is what portion of the project is "federal". To make this determination, the Court must study the federal agency's statutory duties to determine whether federal action is a legal condition precedent to completing the project. In both cases, the Eighth Circuit ruled that there was no federal action required which was a legal condition precedent to any portion of the project which affected the environment. These cases define the extent to which the NEPA requires compliance in a nonfederal portion of fundamentally nonfederal projects.

Respondents do not dispute the statement of Petitioner that generally nonfederal projects are considered federal actions for NEPA and NHPA purposes if they cannot "begin or continue without prior approval of a federal agency" (Petition for Writ, p. 16), or that the six purportedly "conflicting" circuit decisions stand for this proposition.[3] However, in each case where these courts have stated this proposition, the respective courts recognized that the NEPA or NHPA only applied where the activity sought to be enjoined was to be accomplished with federal funds or could not proceed forward without a federal permit or license. This is entirely different from the case at hand where ODF sought to demolish buildings it owned with its own money and did not need to obtain a federal permit to demolish such buildings.

One of the "conflicting" Circuit decisions cited by the Petitioner, *Morris County*, presents an entirely different scenario. In *Morris County*, HUD provided funds to the town of Dover, New Jersey to facilitate a redevelopment plan. Some of these funds were to be used directly for the demolition of a historic structure. Even though the funds had been disbursed prior to the demolition of the historic structure, the plaintiffs claimed HUD was still involved in the project since under the HUD loan contract, HUD still had the authority to require alteration of the plan.

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[3] Respondents do object to any implication by Petitioner that a federal court would have authority under the NEPA or NHPA to enjoin the actions of a private party when the NEPA and NHPA speak only to the actions of federal agencies. *See* Footnote 1, page 7, *supra*.

The court agreed and ruled that there was federal involvement in a project where the federal agency had authority to require alteration to the plan where such alteration would enhance the environment (NEPA) or modify its impact on historic properties (NHPA). This is an important distinction between the *Morris County* case and the present case. In *Morris County*, the federal agency could require a modification to the plan which would preserve a historic building since the demolition of the building was the subject of the HUD funding contract. In the present case, even if the National Park Service for instance could require an alteration to Douglas County's plan for acquisition and construction of the Park, such an alteration would only operate within the borders of the Park and would not reach into Jobber's Canyon which is entirely outside the Park.

The facts in *WATCH v. Harris*, 603 F.2d 310 (2nd Cir. 1979) are virtually identical to the facts in *Morris County*. In *WATCH*, HUD funds were to be used directly for the demolition of historic structures. All of the HUD funds had not yet been disbursed. As a result, HUD still had the authority to require alteration of the project before disbursing any more funds.

In *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), county officials proposed constructing a road through federal lands. The court determined that the Bureau of Land Management was obligated, pursuant to the Federal Land Policy and Management Act, to insure that the county's construction of that road did not unnecessarily degrade the condition of the federal property. As a result, under the Federal Land Policy and Management Act, the

Bureau of Land Management had direct regulatory control over how the county constructed its road.

In *Maryland Conservation Council,* the Fourth Circuit Court ruled that the NEPA did apply where the defendant sought to construct a highway through a state park which was originally acquired partially with federal funds. It was very clear that the National Park Service would have to issue a permit before the county could construct a road through this park. Therefore, the activity sought to be enjoined could never occur without action on the part of a federal agency. The *Maryland Conservation Council* case presents an interesting comparison to the case at hand. For the case at hand to be analogous to *Maryland Conservation Council,* it would have been necessary for Jobbers Canyon, not the Douglas County Park, to have been acquired with the National Park Service funds. Under that fanciful scenario, ODF would have to obtain permission from the National Park Service to demolish buildings acquired with federal money.

In *Foundation on Economic Trends v. Heckler,* 756 F.2d 143 (D.C. Cir. 1985), the plaintiffs sought to enjoin an experiment proposed by University of California scientists to release genetically engineered organisms into the open environment. Before the scientists could release these organisms into the open environment, they first had to obtain approval from the National Institutes of Health. As a result, the scientists had to obtain a permit from the federal government to conduct this activity.

Biderman v. Morton is actually an odd case for Petitioner to cite. In that case, the plaintiffs sought to enjoin

the local municipal authorities from issuing building permits and zoning variances. The plaintiff's theory in the *Biderman* case revolved around Congress' Fire Island National Seashore Act, which authorized the appropriation of funds to condemn beachfront properties in the area of these municipalities in order to preserve the natural state of these sites. The National Park Service was to carry out these condemnations and prepared a master plan for determining which sites to acquire. The National Park Service itself determined that the preparation of the master plan constituted a major federal action and therefore undertook preparation of an environmental impact statement in conjunction with the development of the master plan. At the time the action was commenced, the National Park Service had not yet completed the environmental impact statement. As a result, the plaintiffs' claimed that the municipal authorities, which were subject to neither the Fire Island National Seashore Act nor the NEPA, could not issue any permits or zoning variances until the environmental impact statement was complete.

The Circuit Court in *Biderman* ruled that the agency's authority under the Fire Island National Seashore Act did not give that agency "go ahead" power over the zoning and permitting decisions of the municipalities. The validity and operative effect of the local zoning and permit ordinances did not depend upon any approvals to be granted by the federal agency pursuant to the Fire Island National Seashore Act. As a result, the Court ruled that the local municipalities' acts of granting construction permits and zoning variances did not trigger the NEPA, even though such acts had an obviously detrimental effect on the very environment which the Fire Island National

Seashore Act sought to protect. Similarly, ODF did not need to obtain any permits from the National Park Service, the I.C.C. or the Army Corps of Engineers to demolish Jobbers Canyon.

In all of the "conflicting" decisions cited by the Petitioner, it was the very act sought to be enjoined which the federal agency had direct regulatory control over or contributed funds to. There is no conflict between circuits. All of the circuit courts which have considered this issue have followed the same standard as the Eighth Circuit in this case.

First Circuit. In *Citizens for Responsible Area Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982), land leased from an airport to build a hangar did not trigger NEPA even though the original airport facilities were federally funded. The trial court was led to believe that any expansion of the airport was enjoinable under NEPA whether or not there was federal involvement in that expansion. The circuit court vacated the injunction because "NEPA applies only to 'federal' actions" and "a project such as this one, which is not itself federally funded nor significantly bound up in a federally funded project, is not 'federal.' " 680 F.2d 835, 839. *Chick v. Hills*, 528 F.2d 445 (1st Cir. 1971), involved a tract of land that had been segmented and separated from a HUD financed project. Plaintiffs insisted that it should have been included in the project. The district court found there was no planned federal participation in the segmented portion of the project. The court of appeals affirmed saying the "plaintiffs had the burden to show that the federal government had plans to participate in future projects on excluded

segments of the parcel." The court pointed out that the question of whether a project is federal for NEPA purposes is one of fact and the district court's findings can only be set aside if they are clearly erroneous. 528 F.2d 448.

Third Circuit. In *N.A.A.C.P. v. Medical Center, Inc.*, 584 F.2d 618 (3d Cir. 1978), the existence of required ministerial approval by the Secretary of H.E.W. of capital expenditures by a private hospital did not trigger NEPA. The Secretary's Section 1122 approval action was not "major" because "(1) the agency only had ministerial responsibilities relating to the relocation plan, (2) the agency gave no direct financial aid to the project, and (3) the overall federal involvement in the project was not sufficient to turn essentially private action into federal action."

Fifth Circuit. In *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983), plaintiffs filed suit to enjoin construction of a 25-mile electric transmission line along the west bank of the Mississippi River. The federal agency involved decided not to develop an impact statement. The trial court denied the injunction and the court of appeals affirmed. The court noted: "the record in this case does not show that this permitting process is sufficient to 'federalize' this action thus requiring an environmental impact statement . . . " A private act does not become a federal act, albeit a major one, merely because of some incidental federal involvement. 711 F.2d at 644, note 9. *See also Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989) and *Save the Bay, Inc. v. United States Corps of Engineers*, 610 F.2d 322, *cert. denied*, 449 U.S. 900, 101 S.Ct. 269 (5th Cir. 1980).

Sixth Circuit. The court of appeals approved an I.C.C. authorization for merger of a railroad and a barge line. With respect to the environmental impact, the court said: "we do not believe that, in assessing the environmental impact of the merger, the Commission was obligated to assess the impact of contemplated projects which the Commission has no power to approve, which are not an inherent component of the proposed merger, and which will be subject to environmental review should they ever reach the actual proposal stage." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (6th Cir. 1986).

Seventh Circuit. In *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976), the court concluded that a private entity could demolish a historic building it owned even though the Comptroller of Currency must approve an application by the private party to move its bank to the site of the demolished building. The court pointed out: "the Bank's project of demolishing the privately owned structure for clearance of the property to facilitate the construction of a new building is a private act over which the Comptroller has no authority, either expressed or implied . . . " 534 F.2d 1246.

Eighth Circuit. In *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), a citizen sought to enjoin construction of a parking ramp next to gambling facility operated by the Indian Commission. The injunction was denied because the Secretary of Interior's actions in approving a contract between the Indians and the City concerning the parking ramp to be constructed next to bingo facility was too incidental to the parking ramp project to constitute major federal action requiring environmental assessment. The court pointed out that no federal action was a legal

condition precedent to construction of the parking lot. The court also relied on the following three factor test: (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether "the overall federal involvement with the project is sufficient to turn essentially private action into federal action." 828 F.2d at 1308. In *Winnebago Tribe of Nebraska v. Ray*, 620 F.2d 269, *cert. denied*, 449 U.S. 836, 101 S. Ct. 110 (8th Cir. 1980) and *Missouri Coalition For The Environment v. Corps of Engineers*, 866 F.2d 1025 (8th Cir. 1989), the Eighth Circuit Court of Appeals applied the same standard.

Ninth Circuit. In *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989), the court reviewed recently adopted Corps of Engineers regulations relating to the segmentation of projects and concluded the broken chain rule applies. Each segment stands alone, but each link within a segment does not. The court ruled that a golf course and a resort were unconnected segments, not connected links within a segment. 884 F.2d 400.

Tenth Circuit. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), expresses the rule, in this manner: "The touchstone of major federal action, . . . is an agency's authority to influence significant nonfederal activity." This influence must be more than the power to give nonbinding advice to the nonfederal action.

D.C. Circuit. A permit to discharge waste requirement does not give the agency authority to regulate construction of the building from which the discharge will ultimately come. *Natural Resources Defense Council, Inc. v.*

U.S. Environmental Protection Agency, 822 F.2d 104 (D.C. Cir. 1987). The court said: "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers . . . whatever action the agency chooses to take must, of course, be within its province in the first instance. In the circumstances at hand, the 'major federal action' which is subject to environmental review is the issuance of a permit to discharge pollutants; it is not the authorization of construction." 822 F.2d 129.

The circuits are unanimously agreed that the agency must have authority over some aspect of the federal portion of the project which would directly impact the nonfederal portion. In the case at hand, development of the park, relocating the railroad, and altering the sewers are not only not subject to any federal agency control, they have no bearing, immediate or remote, on ODF's demolition of the warehouses in Jobbers Canyon – which, in fact, has already occurred.

2. No conflict with applicable decisions of this Court.

Petitioner claims that certiorari should be granted pursuant to U.S. Supreme Court Rule 10.1(c) since the decision of the Eighth Circuit in this case conflicts with this Court's decisions in *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989) and *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989). Petitioner claims that this Court recently acknowledged the duty to consider off-site impacts and that the Eighth Circuit disregarded this doctrine. However, this case does not even share any issues with the *Robertson* and *Marsh* cases. The case for which certiorari is now sought by Petitioner dealt

with whether or not federal agencies are required to consider indirect or off-site impacts of the activities of a private developer when determining whether or not NEPA was applicable to the project. In the *Robertson* case, there was no issue as to whether or not the NEPA applied. The federal defendant in that case, the Forest Service, made its own determination that the permit it issued was a major federal action and that NEPA did apply. The issues in *Robertson* dealt with what had to be contained in the environmental impact statement after it was determined that the NEPA applied.

Therefore, there is no relationship at all between this case and the *Robertson* case, and the ruling in this case certainly does not conflict with the *Robertson* case.

Respondents cannot determine for what purpose Petitioner has cited the *Marsh* case, which only involved the activities of a federal agency (no private developer was involved) which made its own decision that the NEPA was implicated by its activities. There was no discussion of the off-site impact at all in the *Marsh* case. As a result, it is hard to imagine how the Eighth Circuit's decision in this case is at odds with the *Marsh* case.

3. No important question of federal law which has not been, but should be, settled by this Court.

Given the fact that there is no conflict concerning this issue between the various circuit courts or with this Court, there is no question of federal law, much less

important question, which has not been, but should be, settled by this Court.

4. No special or important reasons for granting writ of certiorari.

U.S. Supreme Court Rule 10.1 first and foremost requires that before review on writ of certiorari will be granted there must exist special and important reasons therefor. Generally, the importance arises out of issues affecting the public in general as distinguished from importance to the particular parties involved. See for instance, *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) where this Court originally granted certiorari then dismissed the same despite the fact that there was a conflict in the decisions of the 5th and 9th Circuit Courts. This Court stated that it was very important that it be consistent in not granting a writ of certiorari except in cases involving principles, the settlement of which is important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts. *See also, Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620 (1955).

Further, though an issue may be important in the sense that it is interesting, this Court has ruled that importance implies a reach to a problem beyond the academic or the episodic. *Rice*, 349 U.S. at 74, 75 S. Ct. at 616.

In its ruling in this case, the Eighth Circuit stated that none of the Appellants' arguments persuaded the Eighth

Circuit that any of the federal defendants had the degree of de jure or de facto control over Jobbers Canyon necessary to trigger consultation procedures and environmental review under the NEPA or NHPA. Nonetheless, Petitioner claims the involvement of the federal defendants was sufficient to invoke the requirements of the NEPA and NHPA. As a result, Petitioner is simply claiming that the district court and circuit court considered the factual evidence incorrectly. However, this Court has previously stated that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). *See also, Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).

Where the district court and circuit court have reviewed the facts and reached the same conclusion, this Court ordinarily will find no reason to review those facts itself. "A court of law, such as this Court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver, Inc. & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538 (1949); *Bereny v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 670 (1967).

CONCLUSION

The trial Court clearly acted properly as did the Eighth Circuit Court and their decisions should not be disturbed. Petitioner failed to establish any state of facts indicating that the demolition of Jobbers Canyon required or involved any federal funding, approvals, permits or licenses which might establish that the demolition of Jobbers Canyon was a federally assisted undertaking or major federal action.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	ORDER ON MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	
	)	(Filed Apr. 13, 1988)

In accordance with the memorandum of today,

IT IS ORDERED that the plaintiffs' motion for temporary restraining order and preliminary injunction, filing 6, are denied.

Dated April 13, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	MEMORANDUM AND ORDER ON MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	
	)	(Filed April 13, 1988)

EVIDENCE

At the hearing on these motions on April 12, 1988, eighty-four documents were submitted on behalf of the plaintiffs and seven on behalf of the defendants. I declined to rule on receipt of the exhibits because of the press of time, but reserved ruling. I now make the evidentiary rulings, although the parties must understand that I have studied, at least to the extent that appeared to be necessary for a proper ruling on the motions, all the documents presented. The formal rulings are as follows:

1. these exhibits are received in evidence and the objections overruled: plaintiffs' Exhibits 8, 12, 14, 16, 17, 18, 19, 21, 27, 82, 83, and 84; and defendants' Exhibits 101, 102, 103, 104, 105, 106, and 107:

2. objections on grounds of foundation, relevancy and hearsay are sustained as to the remaining documents.

I note only briefly that the plaintiffs are correct in suggesting that there should be a looser standard at a hearing on preliminary motions than at the trial, but the standard cannot be so loose that weight is given to documents neither athenticated [sic], nor shown to have any effect on anything done or planned to be done, nor to be the product of someone having personal knowledge of the contents. Such is the nature of many of the documents offered by the plaintiffs. For example, the only support offered for Exhibits 31 through 54 is the affidavit of Mark Himes, Exhibit 82, which says:

> "These Exhibits came from three sources. One was an examination and copying by Ed Fogarty of the file of Oliver Wolf, Federal Benefits Coordinator at the State Park and Game Commission in Lincoln, Nebraska in about mid-March 1988. Other documents came during informal discovery by Ed Fogarty with County Property Director Hogan in the presence of Deputy County Attorney Henry Wendt on 4/6/88. The other documents in this group came from an examination and copying of documents by Edward F. Fogarty at the National Park Service office at Braiker-Brandeis Building, Omaha, Nebraska, on or about 4/6/88."

That gives absolutely no ground for any weight to be given to such documents. It provides neither authenticity nor a likelihood of personal knowledge of facts stated. The one case drawn to my attention by the plaintiffs' counsel is *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23 (1st Cir. 1986). It says that a trial court committed no error in receiving as evidence for purposes of a preliminary injunction transcripts from a hearing before an administrative law judge, which were claimed on appeal to

have been hearsay but which may not have been objected to on the grounds of hearsay at the time of the hearing before the district court. The court said:

> "Affidavits and other hearsay materials are often received on preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceedings. . . ."

The plaintiffs also call my attention to the Notes of the Advisory Committee on Rules to the 1966 amendment of Rule 65(a)(2) which says:

> "*Subdivision(a)(2)* – This new subdivision provides express authority for consolidating the hearing of an application for preliminary injunction with a trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper."

This has to do with consolidation of the hearing on the preliminary injunction with the trial on the merits. There is no indication that any of the parties wanted a consolidation and the subject has not been discussed with the court. Suffice it to say, however, that in my judgment there is not a likelihood that can be based on anything other than pure speculation that most of the excluded exhibits would be presented at a trial in a form that would make those documents admissible. It is conceivable, of course, that information in some of the documents could be presented by live witnesses, but the

documents themselves would for the most part be inadmissible. In any event, a consideration of the substance of all those documents would not change the outcome of my ultimate ruling on the motion now before me.

I have exercised some liberality in putting into evidence some of the matters offered. For example, the deposition of Richard Niedergeses, Exhibit 84, is in evidence, although it has not been signed by the deponent, the reading and signing of the deposition have not been waived by anyone, and there was no stipulation waving any of those requirements. The affidavit of Mark Himes, Exhibit 82, also is in evidence although lacking any declaration that he has personal knowledge of the source of the documents mentioned and saying nothing that tends to establish any feature of the admissibility of the documents.

II. BACKGROUND

This action was prompted by development plans affecting the Jobbers Canyon Historic District, a six and one-quarter block warehouse district in downtown Omaha that is included in the National Register of Historic Places. On February 2, 1988, the City Council of Omaha adopted a "Riverfront Redevelopment Plan" approving a redevelopment project that includes Jobbers Canyon. On March 15, 1988, the Omaha City Council approved a redevelopment agreement between the City of Omaha, the Omaha Development Foundation (ODF), ConAgra, Inc., Douglas County, and the Peter Kiewit Foundation. Completion of the redevelopment project

will require demolition of the buildings in Jobbers Canyon. The plaintiffs allege that this demolition "will represent the largest single destruction of historic register properties in the twenty years that the National Trust for Historic Preservation has been [m]onitoring these matters." Complaint ¶ 21.

The area included in the $275 million redevelopment project is bounded by Tenth Street on the west, the Missouri River on the east, Farnam Street and Interstate 480 on the north, and Leavenworth Street on the south. Jobbers Canyon lies within the redevelopment project area between Tenth and Eighth Streets on the west and east, and Farnam and Jackson Streets on the north and south.

The plaintiffs include People for Responsible Omaha Urban Development (PROUD), a not-for-profit corporation dedicated to historic preservation, Mercer Management Company (Mercer), the "main developer" of the Old Market Historical District adjacent to Jobbers Canyon, and Roger Durand, who resides in the Old Market.

The defendants include parties to the redevelopment agreement (the City of Omaha, Douglas County, ODF, and ConAgra), the mayor of Omaha (Bernie Simon), and several federal agencies (Interstate Commerce Commission, National Park Service, Army Corps of Engineers, Federal Aviation Agency) and their heads.

The plaintiffs allege that the defendants are violating the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) by proceeding with the redevelopment project without following the review procedures in those acts. They seek to enjoin the imminent demolition of buildings in Jobbers Canyon

pending a ruling on the merits of the case. The defendants contend that the plaintiffs lack standing to bring this action. Responding to the merits of the plaintiffs' legal argument, the defendants argue that the redevelopment project does not require the federal involvement necessary to trigger the review requirements of either NEPA or the NHPA.

II. STANDING

The power of this court to decide this matter is granted by Article III of the constitution. To ensure that federal courts assume jurisdiction only over Article III "cases and controversies," Supreme Court decisions have instructed that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

A. PROUD

PROUD's primary purpose is "advocat[ing] preservation of sites, buildings and objects of cultural and historic significance as part of responsible urban planning for the City of Omaha and to conduct public education programs through lectures, tours and publications." Complaint ¶ 1.

Of its "approximately 200 members, some . . . own property in the Old Market historic district, and some . . . reside in the Old Market and the Jobbers Canyon Historic Districts, and all . . . derive benefit from Jobbers Canyons' significance as a cultural and historic landmark." *Id.* PROUD alleges that it will suffer "injury in fact" from the defendants' noncompliance with NEPA and the NHPA. *Id.*

PROUD's allegations do not establish that it has standing to assert its own interests in this case. It has not shown how the challenged actions will injure its ability to pursue its objectives. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 735 n.8 (1972) (requiring that association allege that "it or its members would be affected" in "their activities or pastimes by the . . . development"; an association must have more than an interest in a problem). Nevertheless, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief request requires the participation of individual members in the lawsuit."

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 54 U.S.L.W. 4764, 4766 (U.S. June 25, 1986), quoting and reaffirming *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The second two elements of the three-part *Hunt* test easily are satisfied in the present case. Concerning the first element, the complaint alleges that some members own land immediately adjacent to Jobbers Canyon and that some live in Jobbers Canyon or immediately adjacent. Yet, while the complaint contains generalized allegations of harm to PROUD, it says nothing about the injury to its members. *Cf. Weintraub v. Rural Electrification Administration*, 457 F. Supp. 78, 88 (M.D.Pa. 1978) (association has standing under NHPA because it alleged that "the aesthetic and cultural well-being of the area in which" its members resided "will be damaged"). PROUD, therefore, lacks standing both in its individual and representative capacities.

B. Durand

Roger Durand alleges that he resides "in the Old Market Historic District which is immediately adjacent to . . . Jobbers Canyon," and that his "use and enjoyment of the Jobbers Canyon National Historic District will be adversely affected by the actions of the Defendants. . . ." Complaint ¶ 3. His other allegations add nothing material for purposes of analyzing standing. He fails to show a relevant interest and how it might be injured by the defendants' alleged statutory noncompliance.

C. Mercer

Mercer Management Company alleges that it "owns property within the Old Market Historic District, located immediately adjacent to . . . Jobbers Canyon," and is the

"main developer of Omaha's 'Old Market'. . . ." Complaint ¶ 2. It alleges that it will suffer injury from noncompliance with NEPA and the NHPA, and that the "the destruction of Jobber[s] Canyon will change adversely the ambience of the Old Market." *Id.*

The defendants argue that the only injury alleged by Mercer is economic, not aesthetic or environmental, and that allegations only of economic injury do not bring it within the "zone of interests" protected by NEPA and the NHPA. There are at least two problems with the defendants' attack. First, their arguments are based solely on unfavorable inferences from the complaint. Mercer does not allege economic injury, and there is no basis for concluding that it is motivated solely by pecuniary interests. *See Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 499 (D. Neb. 1978), *aff'd sub nom. Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083 (8th Cir. 1979).

Second, even assuming that Mercer's concerns largely are economic does not take it outside the zone of interests of the NEPA and the NHPA. The zone of interests requirement is a prudential principle, not an Article III limit on federal court jurisdiction. *Valley Forge*, 454 U.S. at 475. The Supreme Court recently explained that, although sometimes generally listed as a prudential consideration, zone of interests analysis primarily is applied in cases involving claims under the Administrative Procedure Act, and that "the test is most usefully understood as a gloss on the meaning of § 702." *Clarke v. Securities Industry Ass'n*, 55 U.S.L.W. 4111, 4114 n.16 (U.S. Jan. 14, 1987).

The cases cited by the defendants for the proposition that Mercer is not within the zone of interests of NEPA are distinguishable on their facts. *See Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976); *Monarch*, 452 F. Supp. 493. Similarly, I do not read *Weintraub*, 457 F. Supp. 78, to support the defendants' contention that Mercer is outside the zone of interests to be protected by the NHPA. Thus, Mercer's allegations are barely sufficient to establish that its interest in the ambiance of the Old Market will be injured by the defendants' failure to seek review of its plans for Jobbers Canyon, and that that injury is within the zone of interests protected by NEPA and the NHPA.

III. WHETHER AN INJUNCTION SHOULD ISSUE

It is the plaintiff's burden to show that it is entitled to have demolition of the buildings in Jobber's Canyon enjoined.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

A. Harm to the Litigants

"[T]he act of demolition is irrevocable." *Boston Waterfront Residence Ass'n v. Romney*, 343 F. Supp. 89, 91 (D.Mass. 1972). The plaintiff stresses that, unless enjoined, ODF immediately will begin demolition of Jobbers Canyon, resulting in the irretrievable loss of a "historic and cultural resource," Plaintiffs' brief at 19, affecting the "ambience" of the area.

Balanced against the interests asserted by the plaintiff are the defendants' interests. Delay of the redevelopment project may result in its abandonment. Exhibit 107. ODF estimates that if the redevelopment plan is not implemented, it will incur a loss of at least $10 million. Exhibit 106. ConAgra estimates that delays will cost it approximately $8.5 million per year in product research and development revenues, $4.178 million in aggregate annual duplicate rentals, and probable loss of key personnel. Exhibit 107. The litigants on both sides assert significant interests.

B. The Public Interest

Similarly, the public interests advanced by both the plaintiff and the defendants are important. The plaintiff seeks to protect Jobbers Canyon "so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b). Although omitted from the plaintiffs' assertions, the court takes notice of the strong national policy, embodied in NEPA, of environmental protection.

The defendants argue that this case illustrates the public interest in guarding the proper working of federalism so that local authorities may choose to pursue projects without federal involvement. They argue that the City of Omaha has sought for nearly two decades to develop the "blighted and undeveloped" area included in the redevelopment plan, and that it is in the interest of the city and its inhabitants that the plan not be abandoned. Defendants' brief at 40. Both the plaintiff and the defendants assert weighty public interests.

C. Probability of Success on the Merits

The National Environmental Policy Act requires that an environment impact statement be prepared for "major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C.A. § 4332(2)(C). "Major Federal action," as used in NEPA,

> includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27 [defining "significantly" as it applies to impact]). Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new

> or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. . . .
>
> (b) Federal actions tend to fail within one of the following categories:
>
> * * *
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18 (1987).

There is absolutely no evidence in this case of any "major Federal actions" involved in the redevelopment plan, and all of the evidence on this point affirms that no federal involvement is contemplated. Exhibits 102-107. The defendants, therefore, have no NEPA obligations in connection with the redevelopment plan. *See Citizens for Responsible Area Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982); *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974); *Biderman v. Morton*, 497 F.2d 1141 (2d Cir. 1974); *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972); *cf. Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973). The plaintiff's arguments of speculative future federal involvement does not trigger the review requirements of NEPA for this redevelopment project. *See, e.g., City of Oak Creek v. Milwaukee Metropolitan Sewerage Dist.*, 576 F. Supp. 482 (E.D.Wis. 1983); *O'Brien v. Brinegar*, 379 F. Supp. 289 (D.Minn. 1974).

There is, therefore, no likelihood of success on the merits of the NEPA claim.

The National Historic Preservation Act requires that

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [and] . . . shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C.A. § 470. For purposes of the NHPA,

> "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.2(o)(1987).

There is no evidence that the redevelopment project will utilize federal funds or require federal licenses or permits. The evidence on this point is to the effect that the defendants intentionally designed the plan to exclude federal involvement and that none is necessary. Exhibits 102-107. The plaintiffs efforts to argue possible and past

federal connections either are too speculative or removed. *Cf. Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976); *Weintraub*, 457 F. Supp. 78 (M.D.Pa. 1978).

As with the NEPA claim, there is no likelihood of success on the merits of the plaintiff's NHPA claim. Although asserting significant harm to itself and to the public interest, the plaintiff has not shown any probability of success on the merits, thus failing to meet its burden of proving that it is entitled to the extraordinary relief sought.

Dated April 13, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, (PROUD), et al., Plaintiffs, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION et al., Defendants.	CV88-0-247 FINDINGS AND RECOMMENDATIONS (Filed Jan. 20, 1989)

Presented to me in my capacity as a magistrate and a court-appointed master (filing 108) for determination at trial commencing on December 5, 1988 and concluding on December 8, 1988 were the last three issues necessary for the final resolution of this case. The three questions were framed in a supplemental progression order (filing 275) and in the pretrial order (filing 429). No party appealed from the progression order issued in August of 1988, which first framed these issues:

1. whether the plaintiffs and the intervenor have standing and capacity to sue in this case,

2. whether all indispensable, proper or necessary parties have been joined in this case such that the court can provide adequate relief, and

3. whether title to the Central Park East is defective, thereby causing a conversion under the Land and Water Conservation Fund Act resulting in some basis by which the court may generally take remedial measures as to Jobbers Canyon or the Redevelopment Project. (Filing 429).

Also for resolution by me are the dispositive motions held in abeyance pursuant to my previous findings and recommendations (filing 261, part VII) submitted on July 28, 1988 (which findings and recommendations resolved all other issues except those set for trial in December or otherwise explicitly held in abeyance), and the dispositive motions asserted in connection with the December 5, 1988 trial, with respect to which I took under advisement. All evidence previously received regarding the issues described in the previous findings and recommendations (filing 261) was considered by me, pursuant to the pretrial order (filing 429), regarding the three issues tried in December of 1988. Posttrial briefs have been received, and oral argument has been heard. These findings and recommendations are considered by me to constitute findings of fact and conclusions of law interchangeably, and are not intended to modify, alter or amend the prior findings and recommendations (filing 261) except to the extent explicitly stated, if at all, in these findings and recommendations.

I.

A.

People for Responsible Urban Development ("PROUD"), Mercer Management Company ("Mercer"),

and Roger Durand, collectively referred to as the plaintiffs, filed this case on March 25, 1988. (Filings 1, 30 and 325). The plaintiffs wanted to stop the demolition of a part of downtown Omaha, Nebraska referred to as "Jobbers Canyon." Jobbers Canyon consists of about six and one-quarter square blocks and includes a number of large-scale, primarily early twentieth-century, warehouses having historic significance. Jobbers Canyon is listed on the National Register of Historic Places ("National Register"), 16 U.S.C. § 470a, by nomination of the City of Omaha, Nebraska on December 4, 1986. (Exhibits 284, 285 and 286).

The plaintiffs sued various federal defendants, including the Interstate Commerce Commission ("ICC"), the National Park Service ("Park Service"), and the Army Corps of Engineers ("Corps"), collectively referred to as the federal defendants. The plaintiffs also sued the City of Omaha ("City"), the County of Douglas, Nebraska ("County"), the Omaha Development Foundation ("ODF"), and ConAgra, Inc., collectively referred to as the nonfederal defendants. On April 13, 1988, Judge Urbom denied the plaintiffs' request for a temporary restraining order and preliminary injunction. (Filing 25).

On April 28, 1988, the National Trust for Historic Preservation in the United States ("Trust") requested leave to intervene (filing 32), asserting a position similar to that of the plaintiffs (Intervenor's Complaint, filing 32, attachment; filing 326). This request was granted on May 20, 1988. (Filing 98). The Trust should not be confused with the Advisory Council on Historic Preservation ("Advisory Council"); the Trust is a corporation created by Congress, while the Advisory Council is an independent

agency of the United States. *Compare* 16 U.S.C. § 468 *with id.* § 470i. The Advisory Council did not attempt to become a party to this litigation.

B.

About the time that Judge Urbom denied the motion for a temporary restraining order and preliminary injunction, demolition of Jobbers Canyon began. The land and buildings comprising Jobbers Canyon are under the control of or are owned by the ODF (Exhibit 202; Vol. I, TR 91:8-92:9), a private nonprofit corporation (Vol. I, TR 84:9-18). The demotion of Jobbers Canyon is a part of the implementation of a significant effort by the nonfederal defendants to revitalized downtown Omaha by, among other things, constructing a corporate office "campus" to be used by ConAgra, and developing the presently undeveloped, but dedicated, county-owned park known as "Central Park East." This proposed revitalization is generally described in the so-called Riverfront Redevelopment Plan" ("Redevelopment Plan"), (Exhibit 201), and exhaustively detailed in the "Redevelopment Agreement," (Exhibit 202). The Redevelopment Agreement was signed by all nonfederal defendants and became effective about May 3, 1988. The Agreement was not signed by the federal defendants. (Exhibit 202).

From a plain reading of the Redevelopment Agreement, and from listening to all the testimony and reading all relevant exhibits, the redevelopment project *does not intentionally or explicitly:* (a) call for the use of federal financial aid to implement the redevelopment, except to the extent that the use of Central Park East could be

characterized as using federal funds expended prior to the redevelopment project; or (b) call for the issuance of any federal licenses, permits, or approvals, except to the extent that federal licenses, permits or approvals, if subsequently required, are required as an unintended and incidental consequence of some part of the redevelopment. As stated by the nonfederal defendants in their brief, "the parties to the Riverfront Redevelopment Agreement have desired from the outset to design and implement a project totally local in character and absent federal assistance or involvement." Trial Brief of Non-Federal Defendants at 34 (Brief submitted in conjunction with the trial held an July 11, 1988 through July 14, 1988).

Jobbers Canyon is generally bounded by 8th Street, 10th Street, Farnam Street, and Jackson Street. (Exhibit 201, page 3 and figure 5). One building in the Canyon is not being demolished, but rather is being developed (Exhibit 284 (map on last page); Vol. I, TR 180:4-181:13). The ODF requires no federal approvals to demolish the Canyon, and has not and will not seek any federal assistance regarding the Canyon. (Exhibit 106). Central Park East is located to the east of Jobbers Canyon, and, when developed, will generally be described as having boundaries extending east, from the present terminus of the Central Park Mall (a previously developed park/mall not to be confused with Central Park East) at 8th Street to the Burlington Northern riverfront line, and from the north, bounded by the I-480 bridge, to the south, corresponding approximately with the extended south right-of-way line of Howard Street. (Exhibit 201, page 12, figures 5 and 6). Exhibit 1026 depicts the park concept. The ConAgra campus will not be located in Central Park East, but will

generally be located to the south and west of the park. (Exhibit 201, pages 12-13, figures 4, 5 and 6; Exhibit 202, attached exhibit 4). The park will remain a public park. (Exhibit 202). Additionally, Central Park East is not located on land where Jobbers Canyon sits.

The concept of Central Park East started in 1978 when the State of Nebraska, through the Game and Parks Commission, acting at the request of, and essentially for, the County, submitted an application, (Exhibit 217, pages 1-6; Exhibit 221), to what is now known as the Park Service for federal funds to acquire and develop park property under the Land and Water Conservation Fund Act. 16 U.S.C. § 4601-1-8. Subsequently, the application was granted on June 16, 1978, and a contract was entered into by and between the State of Nebraska and the predecessor to the Park Service. (Exhibit 217, pages 1-6).

Prior to the 1978 agreement being entered into, the predecessor of the Park Service issued a "negative declaration," indicating that the project – to acquire and develop Central Park East – would not significantly affect the quality of the environment within the meaning of the National Environmental Policy Act. (Exhibit 217, page 35). After the negative declaration was issued, the State Historic Preservation Office advised by letter on May 30, 1978 that the project had been reviewed by that office and the project would have no effect upon properties enrolled in or eligible for inclusion on the National Register. (Exhibit 217, page 26). Jobbers Canyon was considered in this 1978 review. (Vol. IV, TR 800:1-4).

The original agreement was divided into two stages: stage 1 was for acquisition, and stage 2 was for development. (Exhibit 217, pages 1-6). The application was amended six times (Exhibits 217A, 217B, 217C, 217D, 217E and 271F), and the last amendment, dated February 6, 1986, deleted stage 2. (Exhibit 217F). The County acquired the land, about 14.3 acres, with $750,000 from the LWCFA grant and other sources, and the project was "closed out" on February 19, 1986 by the Midwest Regional Office of the Park Service, indicating that the project was complete. (Exhibit 232).

The concept of Central Park East used in the instant redevelopment project includes the acquisition of additional land, without the use of federal funds, and development of the park, including the creation of a lake, without federal funds. (Exhibit 202, section 4; Exhibit 1026). The Central Park East development contemplates a park where "passive" recreation will take place. (Exhibit 202, attached exhibit 4).

The area to be redeveloped includes old railroad trackage. Relocation of one Union Pacific industrial track, the "side hill lead," will be required. (Exhibit 201, pages 7-8, 21, figure 4; Vol. II, TR 469:19-470:10; 472:1-473:16). This trackage is not located upon land where Jobbers Canyon sits.

On the easterly edge of the area to be redeveloped is the Missouri River, and adjacent to the river, on the Omaha side, is a levee system providing flood protection. (Vol. IV, TR 940:25-941:3). The ground upon which the levee is situated is owned by the City, but the levee is supervised by the Corps (Vol. IV, TR 986:5-13;

940:25-941:3), pursuant to a quite detailed operations and maintenance manual (Exhibit 293). The levee is not located upon land where Jobbers Canyon sits.

C.

Since the demolition of Jobbers Canyon threatened to make this litigation moot, the parties were placed on an expedited discovery schedule, and trial on two limited issues commenced on July 11, 1988. (Filing 104). The two issues argued at that trial were:

1. whether, based upon the then existing Riverfront Redevelopment Agreement, including all approved plans, specifications and construction drawings as of the date of trial, there was any federal funding, federal licensing or other federal involvement requiring a section 106 hearing under the National Historic Preservation Act ("NHPA") or otherwise implicating the National Environmental Policy Act ("NEPA") or the Land and Water Conservation Fund Act ("LWCFA"); and

2. if the answer to the foregoing question was in the affirmative, whether a section 106, 16 U.S.C. § 470f, hearing (or other action required under the NHPA, the NEPA or the LWCFA) could result in a federally required retention of one or more buildings in Jobbers Canyon.

I submitted findings and recommendations pursuant to the July, 1988 trial, recommending that judgment on the limited issues presented be entered for the defendants and against the plaintiffs and the intervenor. I found that the answer to the first issue was in the negative, i.e., based upon the then existing Riverfront Redevelopment

Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there was no federal funding, licensing or other involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA. Also, I determined that, insofar as the ODF and ConAgra are concerned, a section 106 review (or other action under the NHPA, NEPA or LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon. (Filing 261). The plaintiffs and the intervenor moved to reject the above findings and recommendations (Filing 268 and 269). Judge Urbom denied such motions and withheld judgment in the matter until all issues are concluded. (Filing 448).

To restate, the three remaining issues necessary for the final resolution of this case are:

1. whether the plaintiffs and the intervenor have standing and capacity to sue in this case;

2. whether all indispensable, proper or necessary parties have been joined in this case such that the court can provide adequate relief; and

3. whether title to the Central Park East is defective, thereby causing a conversion under the Land and Water Conservation Fund Act resulting in some basis by which the court may generally take remedial measures as to Jobbers Canyon or the Redevelopment Project. (Filing 429).

II.

I turn first to the issues of standing and capacity. Although closely related, the issues of standing and

capacity in my view are not the same. I believe that it may be possible for an entity to have standing under article III of the Constitution, yet not have the capacity to institute the suit. I turn then to the issues of standing and capacity. I shall briefly and generally set out the issues, and then address the issues in relation to each plaintiff and intervenor.

As to standing, as Judge Urbom observed when he denied the motion for a temporary restraining order and preliminary injunction, the power of a federal court is both granted and limited by article III of the Constitution:

> The power of this court to decide this matter is granted by Article III of the constitution. To ensure that federal courts assume jurisdiction only over Article III "cases and controversies," Supreme Court Decisions have instructed that
>
> > at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."
>
> *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

(Filing 25, pages 4-5).

In a general sense, the "standing" issues in this case turn on determination of whether the complaining party suffers or will likely suffer any cognizable injury by the acts

complained of in the complaint which are alleged to have been done or threatened by the defendants.

As to capacity, this issue arises with regard to the meaning and scope of the "sue and be sued" clause of the congressional enactment creating the nonprofit intervenor, the National Trust for Historic Preservation in the United States ("Trust"), 16 U.S.C. § 468c(b). The question arises in the context of the Trust's suit in this case against federal defendants and nonfederal defendants in an effort, among other things, to enforce the "anticipatory demolition" regulations of a federal agency, the Advisory Council on Historic Preservation ("Advisory Council") by forcing a so-called "section 106" consultation with the Advisory Council. *Id.* § 470f. The Intervenor's Amended Complaint for Declaratory and Injunctive Relief (filing 326) alleges in pertinent part that the Trust brings the action to require the defendants to comply with federal law including the "regulations of the Advisory Council on Historic Preservation implementing the NHPA" and seeks an injunction preventing "the defendants from undertaking anticipatory demolition within the Jobbers Canyon Historic District until defendants have complied fully with the applicable statutory and regulatory requirements." (Filing 326, page 2).

The Trust is a nonprofit corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare id.* § 468 *with id.* § 470i. The Advisory Council did not seek to become a party to this litigation, but instead has indicated by way of affidavit received into evidence that although Congress granted it the power to litigate, *id.* § 470m(b), the Advisory Council questions its authority to sue sister federal

agencies and rather relies upon the Trust to advance in litigation the interests of Advisory Council. (Exhibit 246(23), Affidavit of John M. Fowler, General Counsel of the Advisory Council).

Specifically, the capacity issue is whether Congress has authorized the Trust to sue federal agencies and nonfederal defendants, where the Trust has no present or contemplated future interest in the buildings being demolished, save for its generalized interest in preservation of historic buildings, particularly where the Advisory Council questions whether the Advisory Council's "suit powers" extend to other federal agencies. Thus, the court should determine whether the Trust's "sue and be sued" clause must be narrowly construed to prohibit suits against federal agencies and nonfederal defendants. *See Loeffler v. Frank*, 56 U.S.L.W. 4554, 4555-56 (U.S. June 13, 1988) (broadly interpreting the "sue and be used" clause regarding the United States Postal Service); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940) (broadly interpreting the "sue and be sued" clause regarding the Federal Housing Administration).

This analysis is to be undertaken with the understanding that when Congress charters a corporation such as the Trust and authorized it to engage in business or commercial ventures with the public, and permits it to be "sue and be sued," one cannot lightly assume that restrictions on that capacity should be implied. *See Burr*, 309 U.S. at 245. Rather, if the general authority to "sue and be sued" is to be impliedly limited, one of the following must be shown: (1) certain types of suits are not consistent with the statutory or constitutional scheme; (2) an

implied restriction is necessary to avoid grave interference with the performance of a governmental function; or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Id.*

Normally, issues of standing should be dealt with at an early stage. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979). However, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by evidence at trial. *Id. See Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 24 & n.2 (6th Cir. 1989) (stating that a complaint under the National Historic Preservation Act was sufficient to withstand a motion to dismiss where "use" of the historic buildings was alleged, but the plaintiffs would be required to particularize the use at trial). Accordingly, I took under advisement the motions to dismiss and motions for summary judgment directed at the standing issues. I now recommend that said motions, both oral and written, be denied, and the issues of standing and capacity be determined on the evidence adduced at trial.

A.

Judge Urbom has not had occasion to rule with regard to the issue of standing insofar as the Trust is concerned. As to the issue of standing, the Trust claims standing for itself and as a representative of its members. I shall discuss these related standing concepts – standing for the corporation and as a representative of its members – separately.

(1)

I find that the Trust has standing for itself to assert the allegations of the Trust's amended complaint (filing 326).

The Trust has a statutory role in the implementation of the NHPA by virtue of its membership in the Advisory Council. 16 U.S.C. § 4701i(a)(8); (Exhibit 4011, 149:7-152:1-15 (Walter Deposition)). Accordingly, I believe that the Trust has demonstrated a sufficient claim of "injury in fact," causation and "redressability" to find standing.

In a similar situation, the court in *Weintraub v. Rural Electrification Admin.*, 457 F. Supp. 78 (M.D. Pa. 1978) held that a state historic preservation officer had standing to bring an action to enforce the NHPA because of the statutorily assigned role of state historic preservation officers in the designation and review process under the NHPA. *Id.* at 88. Similarly, in this case, if the consultation provision of the NHPA, 16 U.S.C. § 470f, is triggered by a finding that there is a legally significant federal involvement regarding Jobbers Canyon, then the Trust, through its chairman, 16 U.S.C. § 470i(a)(8), would be entitled to participate in a consultation designed to preserve Jobbers Canyon.

Although the Advisory Council, and therefore the Trust, does not have a veto over the destruction of historic sites as a result of the consultation, the process of consultation is the congressional means by which federal actions involving the destruction of historic sites are reconciled with national historic preservation policy. *Id.*

§ 470f. Scholars have noted that if a "plaintiff is protesting a claimed invasion of a generalized constitutional injury, the Court appears to be more reluctant to find standing . . . than in cases where the plaintiff is arguably within the zone of interests protected by a federal statute, or a statute appears to grant standing in the case." 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* 129-30 (1986). Thus, the statutory remedy of consultation confers standing on an entity entitled by statute to participate in the consultation. *Weintraub*, 457 F. Supp. at 88. *See Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037, 1039-1041 (8th Cir.1988) (holding that procedural injury may be a judicially cognizable injury in fact for standing purposes, where conversation groups claimed, among other things, that they would suffer harm in fact by increased rates of extinction of animals because the Secretary of the Interior had failed to publish regulations requiring federal agency consultation with the Secretary under the Endangered Species Act, even though the Secretary could not veto the proposed federal action as a part of the consultation under 16 U.S.C. § 1536(a)(2)).

The defendants argue that even if injury in fact and causation have been shown, I must find that all parties lack standing because I have previously found that the court would not be authorized to enjoin the purely private actions of the ODF and ConAgra (filing 261, part VI) and thus, it is argued, that the injury is not redressable by this court. If the injury is not redressable, then there is no real controversy for the court to decide and standing is lacking. However, I believe the defendants misunderstand the issue of redressability.

While I continue to believe that this court is without authority to enjoin the purely private action of the ODF and ConAgra regarding the Canyon, it does not follow that the claimed injury is not redressable by the Court. Defendants confuse the *merits* of the claim with the issue of *standing*. As I have previously stated: "Certainly, if the ODF were required to seek something, or had sought something, from a federal agency regarding the Canyon, the agency and the court would have the power to control the ODF insofar as the subject of the ODF's involvement with the agency." (Filing 261, page 73). However, I found *on the merits* that even if the ICC, the Corps of Engineers or the Park Service had to conduct a full review of the project, the agencies and therefore the court had no authority to control the purely private actions of the ODF or ConAgra. I came to this conclusion after reviewing the evidence as to what ConAgra and the ODF intended to do with the project in general and specifically the Canyon. After understanding these facts, I was able to determine that the agencies had no generalized regulatory power over the ODF and ConAgra, and that the agencies did not have specialized power to grant or withhold anything from the ODF and ConAgra regarding the Canyon because the ODF and ConAgra need not seek anything from the agencies. (Filing 261, pages 72-73). Had the facts been otherwise, the injury would have been redressable by an injunction requiring consultation prior to demolition.

The doctrine of standing "eschews evaluation of the merits," *Coalition for the Environment v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974) (referring to *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S.

669, 689 (1973)). More pointedly, our circuit has specifically held, in the face of an argument that redressability was not present, that "Congress itself has legislated the requisite causation and redressability" under the Endangered Species Act, where a private party sought injunctive relief requiring the Secretary of the Interior to publish regulations requiring federal agencies to consult with the Secretary on actions taken abroad potentially impacting upon endangered species. The court so held, (a) even though the consultation might not stop the action threatening the endangered species because the Secretary after consultation could not veto the project, (b) even where particular federal "action" agencies were not parties to the suit, and (c) even where the foreign governments would not be required to halt the proposed action by any steps taken by the Secretary or the agencies. *Defenders of Wildlife*, 851 F.2d at 1041-44. The consultation process examined in *Defenders of Wildlife* is the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), which is very similar to the consultation process provided for in the NHPA, *id.* § 470f. The right of individuals to bring suit for enforcement of the ESA, *id.* § 1540, is somewhat similar to the "citizen suit" provisions found in the NHPA, *id* § 470w-4. Thus, for essentially the same reasons that the circuit court found the claimed injury "redressable" for standing purposes in *Defenders of Wildlife*, I find the claimed injury here redressable for standing purposes.

(2)

As Judge Urbom has observed (filing 25, pages 4-5), in this case representational, or derivative, standing,

wherein an entity asserts the interests of its members, exists where three circumstances are present: (1) the individual members would have standing to bring the action; (2) the action is germane to the purpose of the entity; and (3) neither the claim nor relief requires the participation of the individual members. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

The Trust bases its claim to representational standing on the testimony of two persons. The testimony of George Haecker (Vol. IV, TR 1049:1-1084:17) establishes the following: he is a member of the Trust and wishes that the Trust represent him; he is an architect living in Omaha, Nebraska whose office is within three blocks of Jobbers Canyon; for some twenty years he has been involved in preserving historical sites in Omaha, Nebraska through serving on public boards such as the Nebraska Historic Preservation Board and the Omaha Landmarks Commission; he frequently tours Jobbers Canyon; he has held walking tours of Jobbers Canyon for fellow professionals and has sought consulting work with regard to buildings within Jobbers Canyon and the adjacent Old Market area; and as a professional architect, he believes that the loss of the Canyon threatens him both professionally and personally, as the Canyon is one of the most important collections of turn-of-the-century warehouses in the nation.

Likewise, the testimony of Clark Strickland (Vol. IV. TR 1084:22-1132:10) establishes the following: he is a member of the Trust and wishes that the Trust represent him; he is a historian employed by the Trust as Regional Director of the Trust; while he lives in Denver, Colorado,

he has visited Omaha, Nebraska often, both before and after this litigation, having toured Jobbers Canyon on each occasion; as a professional historian, he believes that the loss of the Canyon threatens him both professionally and personally, as the Canyon is one of the most important collections of turn-of-the-century warehouses in the nation.

Parenthetically, there is no factual dispute about the historical and architectural significance of Jobbers Canyon, as the Canyon is listed on the National Historic Register. The City of Omaha's National Register nomination form describes the reasons why the Canyon is historically and architecturally important. (Exhibit 284).

The association need not have a large number of members. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-90 (1973) (holding that an association of five law students had standing). Not all members of the association must suffer the injury for the association to have standing; indeed, if "its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit," standing exists, if other elements of standing are established. *Warth*, 422 U.S. at 511 (emphasis added). *See Pesticide Pub. Policy Found. v. Village of Wauconda*, 622 F. Supp. 423, 433-34 (N.D. Ill. 1985), *aff'd*, 826 F.2d 1068 (7th Cir. 1987) (holding that one affidavit of one member was sufficient for standing, but that the association lacked standing because the individual participation of all members in the suit was required); *Action Alliance for Senior Citizens v. Shapp*, 400 F. Supp. 1208, 1213-14 (E.D. Pa. 1975) (holding that the interests of

six out of three thousand five hundred members were sufficient to provide standing for an association).

What is difficult to determine is whether the alleged "use" of Jobbers Canyon by the standing witnesses is the type of use which makes out a "distinct and palpable" injury for standing purposes when the use is threatened. *Warth*, 422 U.S. at 501. Or stated otherwise: does the "use" of Jobbers Canyon, which is comprised of privately owned buildings in which none of the witnesses claim any ownership interest nor even the legal right to touch the buildings, create a distinct and palpable injury for standing purposes, if, as here, the threatened "use," which defines the claimed injury, is essentially the ability to view the private property from a public street?

If I were to write on a clean slate, I would hold that the denial of the ability to view a privately owned, but historically significant building, from a public street, even by architects and historians having a professional interest therein, is not a "distinct and palpable" injury. *See Landmarks Preservation Council v. City of Chicago*, 1988 Ill. LEXIS 122 (Ill. Sup. Ct., Sept. 22, 1988) (holding that neither a local preservation association nor the Chicago Chapter of the American Institute of Architects, or the members of such groups, had standing under state law to claim injury based upon denial of the right to view historically significant buildings from a public street, although also holding that the Trust had standing in its own right because it was congressionally chartered to assert such interests). However, I do not write on a clean slate.

Our circuit has recognized in an environmental standing case, based upon a concession of the government, that "physical damage to a place an individual personally visits . . . is a type of injury sufficient to confer standing under Article III." *Defenders of Wildlife*, 851 F.2d at 1041. The Sixth Circuit Court of Appeals has stated the following in a NHPA case: "We do not believe that injury-in-fact is suffered only by residents of the neighborhood in which the historically and architecturally significant buildings are located. . . . [T]he [NHPA] created an interest in the preservation of architecturally and historically significant buildings to be protected by *users* of such buildings." *Neighborhood Dev. Corp.*, 632 F.2d at 24. The court also made clear its view that "[b]y alleging 'use' of the buildings' aesthetic and architectural value, plaintiffs met the *Sierra Club* standard," *id.* at 23-24, even where at least some of the threatened buildings, e.g., the Will Sales Building, were privately owned. *Id.* And in another NHPA case, a federal court found standing where a historic courthouse was threatened based, in part, upon the prior use of the courthouse by a lawyer who thus "became acquainted with the purported esthetic values of the Courthouse." *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1332 (S.D.N.Y. 1975).

Here the court is presented with witnesses – an architect and a historian – who "use" the Canyon, albeit from the street, and whose "use" of the Canyon is sufficiently distinct from those who merely pass by the Canyon so that, according to precedent, one can fairly conclude that they have been injured in fact by the proposed demolition. I so find, and in finding so conclude that the members of the Trust would have had individual standing to

bring this action. The Trust has established that its members have or will suffer sufficient injury in fact, the challenged action may be traced to the defendants, and the challenged action may be redressed by a favorable decision. Furthermore, it is obvious that this action is "germane" to the Trust's purpose and that neither the claim nor the relief requires the participation of the individual members. Accordingly, I conclude that the Trust has representational standing.

B.

Judge Urbom found that the plaintiff known as People for Responsible Omaha Urban Development, Inc. ("PROUD"), a Nebraska nonprofit corporation, lacked standing because its institutional interests were nothing more than a generalized interest in the demolition of Jobbers Canyon, and its members would not otherwise have standing to sue in their own right. (Filing 25, pages 4-5). Specifically, Judge Urbom found:

> PROUD's primary purpose is "advocat[ing] preservation of sites, buildings and objects of cultural and historic significance as part of responsible urban planning for the City of Omaha and to conduct public education programs through lectures, tours and publications." Complaint ¶ 1. Of its "approximately 200 members, some . . . own property in the Old Market historic district, and some . . . reside in the Old Market and the Jobbers Canyon Historic Districts, and all . . . derive benefit from Jobbers Canyons' [sic] significance as a cultural and historic landmark." *Id.* PROUD alleges that it will suffer "injury in fact" from the defendants' noncompliance with NEPA and the NHPA. *Id.*

PROUD's allegations do not establish that it has standing to assert its own interests in this case. It has not shown how the challenged actions will injure its ability to pursue its objectives. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 735 n.8 (1972) (requiring that association allege that "it or its members would be affected" in "their activities or pastimes by the . . . development"; an association must have more than an interest in a problem). Nevertheless, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 54 U.S.L.W. 4764, 4766 (U.S. June 25, 1986), quoting and reaffirming *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The second two elements of the three-part *Hunt* test easily are satisfied in the present case. Concerning the first element, the complaint alleges that some members own land immediately adjacent to Jobbers Canyon and that some live in Jobbers Canyon or immediately adjacent. Yet, while the complaint contains generalized allegations of harm to PROUD, it says nothing about the injury to its members. *Cf. Weintraub v. Rural Electrification Administration*, 457 F. Supp. 78, 88

> (M.D.Pa. 1978) (association had standing under NHPA because it alleged that "the aesthetic and cultural well-being of the area in which" its members resided "will be damaged"). PROUD, therefore, lacks standing both in its individual and representative capacities.

(Filing 25, pages 4-5).

Nothing changed at trial which would allow me to conclude that Judge Urbom's finding was incorrect regarding PROUD's lack of standing for itself. Specifically, unlike the Trust, PROUD can claim no statutory right to participate in the sought-after consultation. Therefore, I too find that PROUD lacks standing to maintain this action for itself.

However, PROUD did generally sharpen it's claim of representational standing at trial generally, and specifically regarding the first prong of the *Hunt* test. For example, PROUD presented the testimony of Cynthia S. Tooker (Vol. VI. TR 1215:12-1228:10), a member of PROUD and an Omaha, Nebraska architect who convinced me that she had both a personal and professional interest in the Canyon. For further example, PROUD presented the testimony of Douglas Meier (Vol VI, TR 1231:25-1268:25) a member of PROUD and an Omaha, Nebraska structural engineer with both a personal and professional interest in Jobbers Canyon. Nothing changed at trial to convince me that Judge Urbom's finding was wrong – that the second and third prongs of the *Hunt* test are satisfied insofar as PROUD's claim to representational standing is concerned. Thus, since I now find that the first prong of the *Hunt* test was satisfied by PROUD at trial, and for substantially the same reasons that I found the Trust had

representational standing to assert the interests of its members, *see* part II(A)(2) of these findings, I also find that PROUD has representational standing to assert the interests of its members.

C.

Judge Urbom found that plaintiff Roger Durand lacked standing because Mr. Durand failed to show a relevant interest in Jobbers Canyon and how that interest might be injured by the alleged noncompliance by the defendants. (Filing 25, page 5). Mr. Durand testified at trial (Vol VII, TR 1612:2-1637:14). I find that Mr. Durand presented at trial sufficient evidence to allow me to now conclude that he has standing. I shall briefly summarize his testimony as follows.

Mr. Durand is an architectural and graphic designer who has done work on buildings in the so-called "Old Market" area of Omaha, Nebraska adjacent to Jobbers Canyon, and he has lived in the area for about twenty years. Mr. Durand served the City of Omaha as a member of both the Zoning Board of Appeals and the Landmarks Heritage Commission. The Landmarks Heritage Commission exists to advise the City of Omaha on issues involving historic properties. Mr. Durand is still a member of the Commission. Mr. Durand testified that as recently as of April or May of 1988 he had completed for a client a design for a restaurant to be located in the John Deere building, which is a building situated in the Canyon. Mr. Durand frequently walks through the Canyon. Mr. Durand testified among other things that the destruction of Jobbers Canyon has injured him in that it "completely

alters the environment of [his] home." (Vol VII, TR 1625:5). He explained that he was damaged because the adjacent Old Market area in which he lived was a "National Registered district" adjacent and contiguous to the Canyon and that the destruction of the one historic district would damage the other historic district, thus damaging Mr. Durand's home apparently by changing the aesthetic environment thereof. Mr. Durand also claims injury to his business in that he will have fewer buildings available to redesign compared to what existed in the past when Jobbers Canyon and the Old Market area were intact and available for renovation. As a member of the City's Landmarks Heritage Commission, Mr. Durand has participated in hearings before the Commission and the City Council and anticipates that he would participate, if given the opportunity, in federal consultations regarding the destruction of the Canyon.

I believe that Mr. Durand has established himself as a "user" of Jobbers Canyon, whose interest in the Canyon is unique and sufficiently particular that the destruction of the Canyon will in fact cause him injury in the same sense that I believed members of the Trust would have had standing in their own right. *See* part II(A)(2) of these findings. Much like the neighbors who "used" the historic buildings in *Neighborhood Dev. Corp.*, 632 F.2d at 24, or the lawyer who used the historic courthouse in *Save the Courthouse Comm'n*, 408 F. Supp. at 1332. Mr. Durand has standing in this case.

D.

Judge Urbom found that the plaintiff Mercer Management Company, a Nebraska for-profit corporation, had alleged sufficient factual assertions to find standing, albeit only barely. (Filing 25, page 6). Judge Urbom stated:

> Mercer Management Company alleges that it "owns property within the Old Market Historic District located immediately adjacent to . . . Jobbers Canyon," and is the "main developer of Omaha's 'Old Market'. . . ." Complaint ¶2. It alleges that it will suffer injury from noncompliance with NEP and the NHPA, and that "the destruction of Jobber[s] Canyon will change adversely the ambience [sic] of the Old Market." *Id.*
>
> The defendants argue that the only injury alleged by Mercer is economic, not aesthetic or environmental, and that allegations only of economic injury do not bring it within the "zone of interests" protected by NEPA and the NHPA. There are at least two problems with the defendants' attack. First, their arguments are based solely on unfavorable inferences from the complaint. Mercer does not allege economic injury, and there is no basis for concluding that it is motivated solely by pecuniary interests. *See Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 499 (D. Neb. 1978), *aff'd sub nom. Monarch Chemical works, Inc. v. Thone*, 604 F.2d 1083 (8th Cir. 1979).
>
> Second, even assuming that Mercer's concerns largely are economic does not take it outside the zone of interests of NEPA and the NHPA. The zone of interests requirement is a prudential principle, not an Article III limit on federal court jurisdiction. *Valley Forge*, 454 U.S.

> at 475. The Supreme Court recently explained that, although sometimes generally listed as a prudential consideration, zone of interests analysis primarily is applied in cases involving claims under the Administrative Procedure Act, and that "the test is most usefully understood as a gloss on the meaning of S 702." *Clarke v. Securities Industry Ass'n*, 55 U.S.L.W. 4111, 4114 n.16 (U.S. Jan. 14, 1987).
>
> The cases cited by the defendants for the proposition that Mercer is not within the zone of interests of NEPA are distinguishable on their facts. *See Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976); *Monarch*, 452 F. Supp. 493. Similarly, I do not read *Weintraub*, 457 F.Supp. 78, to support the defendants' contention that Mercer is outside the zone of interests to be protected by the NHPA. Thus, Mercer's allegations are barely sufficient to establish that its interest in the ambiance of the Old Market will be injured by the defendants' failure to seek review of its plans for Jobbers Canyon, and that that injury is within the zone of interests protected by NEPA and the NHPA.

(Filing 25, at page 6).

The testimony at trial of Mark Mercer (Vol VI, TR 1397-1430) did not detract from Judge Urbom's initial conclusion that standing existed, and I likewise so find. (I note that Mercer may not actually "own" buildings in the Old Market area, but it does manage, under contract, certain buildings. A trust owns the buildings. This management interest is real and appears very nearly equivalent to ownership, since the shareholders of the corporation are the same as the trust beneficiaries who hold equitable title to the buildings.)

E.

Also at issue is the capacity of the Trust, a congressionally chartered corporation, to sue federal agencies and their head administrators as well as nonfederal defendants. At oral argument, I asked counsel for the federal defendants whether he was authorized to state that the United States challenged the capacity of the Trust to sue federal agencies. Counsel for the federal defendants indicated that he had explicitly inquired of the Justice Department and that he was authorized to so state. With this understanding, I turn to the issue of capacity.

As to capacity, this issue arises with regard to the meaning and scope of the "sue and be sued" clause of the congressional enactment creating the nonprofit intervenor, the Trust, 16 U.S.C. § 468c(b). The question arises in the context of the Trust's suit in this case against federal defendants and nonfederal defendants in an effort, among other things, to enforce the "anticipatory demolition" regulations of a federal agency, the Advisory Council on Historic Preservation ("Advisory Council") by forcing a so-called "section 106" consultation with the Advisory Council. *Id.* § 470f. The Intervenor's Amended Complaint for Declaratory and Injunctive Relief (filing 326) alleges in pertinent part that the Trust brings the action to require the defendants to comply with federal law including the "regulations of the Advisory Council on Historic Preservation implementing the NHPA" and seeks an injunction preventing "the defendants from undertaking anticipatory demolition within the Jobbers Canyon Historic District until defendants have complied fully with the applicable statutory and regulatory requirements." (Filling 326, page 2).

The Trust is a nonprofit corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare id.* § 468 *with id.* § 470i. The Advisory Council did not seek to become a party to this litigation, but instead has indicated by way of affidavit received into evidence that although Congress granted it the power to litigate, *id.* § 470m(b), the Advisory Council questions its authority to sue sister federal agencies and rather relies upon the Trust to advance in litigation the interests of Advisory Council. (Exhibit 246(23), Affidavit of John M. Fowler, General Counsel for the Advisory Council)).

Specifically, the capacity issue is whether Congress authorized the Trust to sue federal agencies and nonfederal defendants, where the Trust has no present or contemplated future interest in the buildings being demolished, save for its generalized interest in preservation of historic buildings, particularly where the Advisory Council questions whether the Advisory Council's "suit powers" extend to other federal agencies. Thus, the court should determine whether the Trust's "sue and be sued" clause must be narrowly construed to prohibit suits against federal agencies and nonfederal defendants. *See Loeffler*, 56 U.S.L.W. at 4555-56 (broadly interpreting the "sue and be sued" clause regarding the United States Postal Service); *Burr*, 309 U.S. at 245 (broadly interpreting the "sue and be sued" clause regarding the Federal Housing Administration).

This analysis is to be undertaken with the understanding that when Congress charters a corporation such as the Trust and authorized it to engage in business or commercial ventures with the public, and permits it to be

"sue and be sued," one cannot lightly assume that restrictions on that capacity should be implied. *Burr*, 309 U.S. at 245. Rather, if the general authority to "sue and be sued" is to be impliedly limited, one of the following must be shown: (1) certain types of suits are not consistent with the statutory or constitutional scheme; (2) an implied restriction is necessary to avoid grave interference with the performance of a governmental function; or (3) "for other reasons it was plainly the purpose of Congress to sue the "sue and be sued" language in a narrow sense." *Id.*

I find and conclude that the Trust does not have the capacity to sue the federal defendants in this case because the "sue and be sued" clause of the Trust must be narrowly construed in order to avoid grave interference with significant governmental functions and because this type of suit which seeks to force consultation by federal agencies with the Advisory Council is not consistent with the statutory scheme creating the Trust. I conclude that the Trust has the capacity to sue the nonfederal defendants in this case because there has been no showing that such a suit is inconsistent with the statutory scheme establishing the Trust, that such a suit against nonfederal defendants would interfere with a significant federal governmental interest, or that there are other reasons why Congress plainly used the "sue and be sued" clause in a narrow fashion as it regards the nonfederal defendants.

(1)

In this case the Trust has sued the following federal defendants: the Interstate Commerce Commission,

Heather J. Gradison (Chairman of the Interstate Commerce Commission), the United States Army Corps of Engineers, John O. Marsh, Jr. (Secretary of the Army), the National Park Service, and Donald P. Hodel (Secretary of the United States Department of the Interior). (Filing 326). As pointed out above, among other things, what the Trust hopes to accomplish is to prohibit the anticipatory demolition of Jobbers Canyon prior to the federal defendants being forced to consult with the Advisory Council pursuant to 16 U.S.C. § 470f. 16 U.S.C. § 470f provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of the Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

The Trust has not claimed and has presented no evidence to indicate that it has or will have in the future any contract, lease, loan or grant involving Jobbers Canyon, any ownership interest in Jobbers Canyon, or any other ascertainable interest in Jobbers Canyon from which it might be concluded that any proprietary or economic interest of the Trust is threatened. Thus, there is

no question presented here that the property or funds of the Trust, some of which are provided by Congress, *see e.g., id.* § 470a(d)(2), are threatened by the federal defendants. This, then, is not a case where a historic property in which the Trust has a monetary interest is threatened by any act or omission of a federal defendant. Understanding what this case is not about, one may look to how the governmental interest will be adversely and significantly impacted if the Trust's "sue and be sued" clause is interpreted to allow it to sue federal agencies to force consultation with the Advisory Council.

(a)

It is important to understand the legislative history of the Trust, and the relationship of the Trust with other federal instrumentalities, most particularly the Secretary of the Interior, the Attorney General, and the Advisory Council. What follows then is an analysis of the legislative history of the Trust, historic preservation law in relation to the consultation process, and the part each relevant federal entity plays in our national policy respecting historic preservation.

The Trust is a nonprofit corporation, 16 U.S.C. § 468, with the power "[t]o sue and be sued," *id.* § 468c(b), "[t]o the extent necessary to enable it to carry out the *functions* vested in it by sections 468 to 468e [of title 16 of the United States Code]." *Id.* § 468c (emphasis added). The *functions* of the Trust are expressed in only one place, 16 U.S.C. § 468:

> The purposes of the National Trust shall be to receive donations of sites, buildings, and objects

> significant in American history and culture, to *preserve and administer them* for public benefit, to accept, hold, and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the *preservation program*, and to execute *such other functions* as are vested in it by sections 468 to 468e of this title.

Id. § 468 (emphasis added).

16 U.S.C. § 468a establishes a principal place of office for the Trust. 16 U.S.C. § 468b establishes the board of trustees for the Trust, which includes the Secretary of the Interior and the Attorney General as ex officio trustees. 16 U.S.C. § 468c describes the powers and duties of the Trust, without expanding the "functions." 16 U.S.C. § 468d authorizes the Trust to consult with the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments (which is not the Advisory Council). 16 U.S.C. § 468e has been repealed. The only description of "functions," therefore, occurs in 16 U.S.C. § 468.

The "preservation program" referred to at the end of section 468 appears to refer to the word "preserve" in the beginning of the statute. This is because the word "them" is a pronoun referring to the nearest antecedent nouns with which it agrees in gender and number, to wit: "sites, buildings and objects significant in American history and culture." *Id.* § 468. It would appear generally therefore that the *functions* of the Trust are, at least primarily, intended to serve the goal of preservation of historic sites by acquisition, lease, contract, loan or the like. Indeed the only place in the statute describing the Trust's powers where federal agencies are mentioned authorizes the

Trust, not to litigate, but to "contract and make cooperative agreements" with such agencies. *Id.* § 468c(g).

The statute is simply incapable of being plainly read to suggest that the Trust may sue federal agencies for the purposes of forcing a section 106 consultation and enforcing a regulation promulgated by the Advisory Council, particularly when the Trust has not acquired, and will not in the future acquire, directly or indirectly by gift, purchase, contract, loan, or otherwise, an interest in the property to which the regulation is said to apply.

The legislative history of 16 U.S.C. §§ 468 through 468e, developed between 1949, when the Trust was created, to the present, affords not the slightest suggestion that Congress intended that Trust to have the power to sue federal agencies in cases such as this. The bill which became the act creating the Trust, House Report 5170, was originally proposed in the form of House Report 4671. In explaining the purpose of the Trust as one consisting of acquiring and managing historic properties, the following was stated in the Senate and House Reports accompanying House Report 5170:

> The purpose of this bill is to supplement the Federal program for the preservation of important historic sites and buildings of America . . . .
>
> . . . .
>
> Many of these historic sites and landmarks . . . are worthy of preservation and commemoration. The Federal Government, however, cannot afford to assume this responsibility for more than a limited number of places of major national importance. . . .

> . . . Realizing that the Federal Government cannot do the whole job, and that the work of the many local preservation organizations needed to be coordinated and encouraged on a national scale, they vigorously support the establishment of a National Trust for this purpose.

H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285, 2285-86.

Included in House Report 855 and Senate Report 1110 is a report from the Department of the Interior to the Chairman of the House Committee on Public Lands both recommending the passage of and suggesting revisions to House Report 4671. (The suggested amendments were incorporated into anew draft of the bill, House Report 5170.) The report from the Department of the Interior further supports the description of the role of the Trust as one encompassing a managing and coordinating function, not a litigation function against federal agencies:

> Since the Federal Government obviously cannot take over all the historic sites and buildings proposed for preservation, there is need for a national organization supported by non-Federal funds and devoted to the coordination of the many diverse interests in this field and specifically to the preservation of properties which the Federal Government or other organizations cannot conserve. . . .
>
> . . . .
>
> The proposed National Trust for Historic Preservation in the United States will supplement the Federal program of preservation established by the Historic Sites Act of 1935. It will mobilize and coordinate public interest and participation in the preservation of sites and buildings from voluntary resources. It will fill the gap

> in the present system of Federal legislation in this field and will establish a systematic and orderly means of receiving and handling bequests, donations, and gifts which no existing legislation is adequate to do.

Id. at 2287-88 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949)).

It appears inconceivable that the Secretary of the Interior would have supported legislation that authorized a federally chartered corporation to sue his agency or other federal agencies without even mentioning such possibility in his formal presentation to Congress. This is particularly true when one understands that the Secretary of the Interior and the Attorney General are designated ex officio trustees.

Since the enactment of the statute creating the Trust in 1949 there have been virtually no relevant changes in the statutory framework which created the Trust. However, Congress has continued to intertwine the workings of the Trust with federal agencies in an apparent effort to promote cooperation, not litigation. And, when Congress considered litigation between federal entities, it did so carefully and explicitly.

In 1966 Congress authorized the Secretary of the Interior to make matching grants-in-aid to the Trust for "the purposes of carrying out the responsibilities of the National Trust." 16 U.S.C. § 470a(d)(2). Nowhere is there the slightest indication that Congress intended that Trust to be able to sue federal agencies when it considered this

grant legislation. On the contrary, the statute now provides that "[n]o part of any grant made under this section may be used to compensate any person intervening in any proceedings under this subchapter." *Id.* § 470(e). Moreover, it is the Secretary of the Interior, not the Trust, who in 1966 was authorized to maintain the National Register of Historic Places. *Id.* § 470(a)(1)(A).

In 1966, no indication whatever was expressed by Congress or the administration that either branch of government thought it necessary or proper for the Trust to litigate with federal agencies. Once again, the Secretary of the Interior, in a letter to the Speaker of the House, supported the bill assisting the Trust, specifically indicating his support for matching grants to the Trust. H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307, 3312-14 (Letter from Stewart L. Udall, Secretary of the Interior, to Hon. John W. McCormack, Speaker of the House of Representatives (Mar. 2, 1966)). The Secretary thought it important to fund such grants, with no mention of litigation on the national level against federal agencies, "to encourage on an accelerated basis the local initiative and support that is needed for preservation of our historic heritage." *Id.* at 1313.

At the same time that Congress was considering matching grants to the Trust, Congress was also considering the creation of the Advisory Council which would have the authority to consult with other federal agencies on undertaking impacting upon historic properties. *Id.* at 3307-11. *See* National Historic Preservation Act, Pub. L. No. 89-665, tit. I, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 16 U.S.C. § 470f). *See also* National Historic

Preservation Act, Pub. L. No. 89-665, § 201, 80 Stat. 915, 917-18 (1966) (codified as amended at 16 U.S.C. § 470i). It is this consultation process, or so-called "section 106 review," which is at the heart of this lawsuit. National Historic Preservation Act, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 16 U.S.C. § 470f). It was clear when Congress adopted this legislation that Congress intended a cooperative spirit to exist between federal entities.

For example, Congress struck from the legislation powers that the Advisory Council would have had to hold hearings under oath, to compel testimony or production of records and generally reduced the power of the Advisory Council "to conform to the purposes for which it is being created – namely to perform advisory functions." H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin, News 3307, 3310-11. The House report also indicated that it recognized the need for "a high degree of cooperation"; the house committee felt that "it has provided a means of avoiding conflicts and administrative jurisdiction" and "that the national historic preservation effort should continue to be, as it has in the past, a function of the Department of the Interior." at 3310. In an apparent effort to promote cooperation, the statute named, among others, the Secretary of the Interior, the Chairman of the Trust and the Attorney General as members of the Advisory Council. Pub. L. No. 89-665, tit. II, § 201, 80 Stat. 915, 917-18 (1966) (codified as amended at 16 U.S.C. § 470i). The Advisory Council was given no authority to sue in court in 1966. Pub. L. No. 89-665, tit. II, § 205, 80 Stat. 915, 919 (1966) (codified as amended at 16 U.S.C. § 470m).

By 1976, Congress recognized the need to avoid conflicts of interest within the Advisory Council, particularly when the Advisory Council was required to deal with the Secretary of the Interior. So Congress did three things. First, it allowed the Advisory Council to appoint its own Executive Director, as opposed to using the Director of the National Park Service as the Director. Second, it allowed the Advisory Council to hire its own legal counsel, as opposed to hiring its own legal counsel who was then required to report to the Solicitor of the Department of the Interior. Third, it treated the Advisory Council as an independent executive agency of the United States for budget purposes, and not as an agency which was required to seek funding through the Department of the Interior. S. Rep. No. 94-367, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 2442, 2448-51 (Explanation of Amendments, Amendment 3); Pub L. No. 94-422, tit. II, §§ 201 & 205, 90 Stat. 1313, 1320-21 (1966) (codified as amended at 16 U.S.C. §§ 470i & 470m).

Thus, in 1976, for the first time Congress clarified that the Advisory Council was to have litigation authority by providing in part that "[t]he Council shall have a General Counsel . . . to . . . represent the Council in courts of law whenever appropriate, [and to] assist the Department of Justice in handling litigation concerning the Council in courts of law." Pub. L. No. 94-422, tit. II, § 205, 90 Stat. 1313, 1321 (1966) (codified as amended at 16 U.S.C. § 470m). Congress continued to leave the Secretary of the Interior, the Attorney General, and the Chairman of the Trust, among others, as members of the Advisory Council. *Id.* at 1320.

In 1980, Congress for the first time recognized that the Advisory Council might have to sue another agency, and if this was necessary the Council would not be able to use the services of the Justice Department. In commenting upon the Amendments to Title II of the National Historic Preservation Act, Public Law 96-515, House Report 96-1457 provides:

> Section 301(1) clarifies the existing authority of the Council to institute legal proceedings on its own to ensure compliance with the Act. Specifically added is language that refers to the enforcement of agreements with Federal agencies under Section 106, other authorities contained in this Act and implementing regulation. In most instances it is expected that the Council will utilize the Services of the Department of Justice with regard to litigation. However, it is recognized that situations may arise where a Federal agency may violate the provisions of this Act and the only recourse is initiation of legal proceedings by the Council in its own name.

H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6405.

Public Law 96-515, tit. III, § 301(i), 94 Stat. 2998, 2999 (1980), now essentially 16 U.S.C. § 470m(b), provided the following litigation authority:

> The Council shall have a General Counsel, who shall be appointed by the Executive Director. The General Counsel shall report directly to the Executive Director and serves as the Council's legal advisor. The Executive Director shall appoint such other attorneys as may be necessary to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements to Federal

> agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

Pub. L. No. 96-515, tit. III, § 301(i), 94 Stat. 2987, 2999 (1980) (amending Pub. L. No. 89-665, tit. II, § 205, 80 Stat. 915, 919 (1966)) (codified as amended at 16 U.S.C. § 470m).

At the same time that Congress recognized that the Advisory Council might have to sue the federal agency, Congress deleted the Attorney General from the membership of the Advisory Council. Pub. L. No. 96-515, tit. III, § 301(a), 94 Stat. 2998 (1980) (codified as amended at 16 U.S.C. § 470i). Yet, Congress allowed the Secretary of the Interior and the Chairman of the Trust to remain as members of the Advisory Council. *Id.* And Congress further expanded the role of the Secretary of the Interior. First, to "assist the Council" the Secretary, upon request of the Chairman of the Council, was authorized, in essence, to consult by report to the Council about the significance of a particular historic property, the estimated impact of a proposed undertaking on the property, and measures which would avoid, minimize or mitigate jeopardy. Pub. L. No. 96-515, tit. III, § 302(a), 94 Stat. 2987, 3000 (1980) (codified as amended at 16 U.S.C. § 470u). The purpose of this amendment was to insure that the Council's public interest determination was aided by the professional assistance supplied by the Secretary. H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6406. Second, Congress allowed the Council, with the concurrence of

the Secretary, to exempt categories of federal programs from section 106 review. Pub. L. No. 96-515, tit. III, § 302(a), 94 Stat. 2987, 3000 (1980) (codified at 16 U.S.C. § 470v).

(b)

With the foregoing background in mind, it is evident that Congress has carefully crafted a statutory scheme which depends upon a close degree of cooperation between federal agencies and instrumentalities to function effectively. Let me be specific.

The Trust was created generally to foster public participation in the formulation and implementation of national historic preservation policy. Quite clearly, Congress did not intend for the Trust to be independent from other federal instrumentalities, as Congress provided that the Secretary of the Interior and the Attorney General, among other federal representatives, would serve as trustees. From the time of the creation of the Trust to the present, the legislation and legislative history cannot be read to explicitly authorize the Trust to take on an adversarial relationship with federal agencies or instrumentalities.

The Advisory Council was created and evolved to serve as an independent agency with the mission, among other things, to advise the executive branch, through the section 106 process, of information pertinent to particular federal undertakings having the potential of impacting historic properties. The work of the Advisory Council is premised upon receiving the unbiased input of its members, which members include the Secretary of the Interior

as well as the Chairman of the Trust. The litigation authority of the Advisory Council was carefully drafted by Congress with the presumption that in most cases the Advisory Council would be represented by the Justice Department, and only in unusual cases would the Advisory Council proceed to litigate against federal agencies using independent counsel. It thus does not appear coincidental that at the same time that the Advisory Council received explicit Congressional authority to litigate against federal instrumentalities, that Congress removed the Attorney General as a member of the Council.

The Secretary of the Interior has historically been viewed by Congress as playing a pivotal role in the formulation and implementation of historic preservation policy. The Secretary serves as a Trustee of the Trust and as a member of the Advisory Council. The Secretary is authorized to make grants to the Trust independent of the Secretary's role as a trustee. The Secretary is authorized to provide professional advice to the Advisory Council independent of his role as a member of the Advisory Council.

The Assistant United States Attorney for the District of Nebraska has been authorized by the Justice Department to challenge the capacity of the Trust to sue federal agencies, including the Secretary of the Interior. The Advisory Council has advised that despite its litigation authority it has never sued a federal agency, but instead relies upon the Trust to litigate with federal agencies. Mr. Fowler, the General Counsel of the Advisory Council, stated in his affidavit:

> 3. In my capacity as General Counsel, I have been directly involved in decision-making with

> regard to whether the Advisory Council should initiate litigation. Although the Advisory Council is independently authorized by statute to bring suit, 16 U.S.C. § 470m(b), this authority has never been exercised. It is the interpretation of the Department of Justice that this authority does not enable the Advisory Council to bring suit against other Federal agencies. As a matter of comity wit the Justice Department, the Advisory Council has refrained from attempting to exercise its litigating authority. Also, the Advisory Council does not have the staff resources to engage directly in litigation.
>
> 4. Because of these practical limitations on the Advisory Council's enforcement capabilities, the Advisory Council has recognized that the National Trust for Historic Preservation, as a statutory member of the Advisory Council, advances the interest of the Advisory Council through the execution of litigation to ensure that Federal agencies are in full and proper compliance with their obligations under Section 106 of the National Historic Preservation Act (U.S.C. § 470f).

(Exhibit 246(23) (Affidavit of John M. Fowler, General Counsel for the Advisory Council), paragraphs 3 &4). Yet, as will be seen later, the President of the Trust denies that the Trust serves as the litigating arm of the Advisory Council, and as a statutory member of the Advisory Council testifies that neither the Trust nor the Council has viewed the Trust in such vein.

It is this tension, evidenced by the controversy surrounding Mr. Fowler's affidavit, created by this lawsuit between important players in the implementation of national historic preservation policy, which forces me to

conclude that the Trust's authority to litigate against federal agencies in an effort to force a section 106 consultation must be denied. I turn now to my specific reasons.

As to the impact of this suit on the Trust, if the Trust were allowed to sue in this case, the Trust would be suing, among others, the Secretary of the Interior, a statutory member of the Trust who would be represented by an Assistant United States Attorney, who is in turn a representative of another statutory member of the Trust, the Attorney General. The testimony in this case is that a representative of the Attorney General attends the meetings of the trustees of the Trust from "sporadically" to "frequently," while the attendance record of representatives of the Secretary of Interior is very good. (Exhibit 4011 (Deposition of J. Jackson Walter, President of the Trust), 21:8-22-23:1-8). Thus, it is apparent that not only as a matter of law, but as a matter of fact, the Attorney General and the Secretary of the Interior, at least through their representatives, participate in the affairs of the Trust. Therefore, the practical impact of a suit such as this is to place two statutory members of the Trust and the Trust in an adversarial position and renders these statutory trustees unable to fulfill their statutory roles with the Trust at least insofar as the issues of this case are concerned. This is no slight impediment to the Congressional scheme that Congress created for the management of the Trust, since the Secretary and the Attorney General constitute two of the three "public" trustees, with the third being the Director of the National Gallery of Art. 16 U.S.C. § 468b.

At this juncture, it is important to realize that the President of the Trust, educated as lawyer, does not in

any way agree that the Trust should be allowed to sue because of the views of Mr. Fowler, the General Counsel of the Advisory Council, that the Trust is somehow a litigation surrogate for the Advisory Council. (Exhibit 246(23) (Affidavit of John M. Fowler, General Counsel for the Advisory Council). Indeed, the President of the Trust, as a member of the Advisory Council, denied any knowledge that the Advisory Council had a policy that recognized that Trust as the litigating arm of the Advisory Council. He was in fact upset by Mr. Fowler's suggestion, despite the fact that the Trust's lawyers offered the affidavit in support of the Trust's request to intervene in this case:

Q: Would you please read that affidavit of John Fowler.

A: . . . All right, sir.

Q. Have you ever seen that affidavit?

A: I have, yes.

Q: Pardon?

A: Yes.

Q: Fine. Was that affidavit ever furnished to the Board of Trustees?

A: I don't believe so. Not – not to my knowledge.

Q: That affidavit discusses the fact that the advisory council in "4." because of the comity agreement between the Attorney General and other government agencies they are not going to sue each other.

Where you aware of any written document reflecting that?

A: No, I certainly was not.

Q: Did you ever hear of that before?

A: In fact, but not in any kind of written form nor–

Mr. Fowler here refers to the so-called interpretation of the department as a blanket interpretation and I certainly wasn't aware of that until I saw this affidavit.

I frankly find it mistaken, out of place, and wrong. But that is my opinion. It doesn't matter too much.

Q: At least you are not aware of it. You haven't accepted it and you haven't adopted it as if it was an existing policy?

A: Certainly not.

Q: And the trustees have not adopted it as though it is an existing policy?

A: Certainly not.

Q: Would you read "4."

A: Yes.

Q: "Because of these practical limitations on the Advisory Council's enforcement capabilities, the Advisory Council has recognized that the National Trust for Historic Preservation, as a statutory member of the Advisory Council advances the interest of the Advisory Council through the execution of litigation to ensure that federal agencies are in full and proper compliance with their obligations under section 106 . . . "

A: That is what it says.

Q: Were you aware that the Advisory Council took that position?

A: I wasn't, and I am still not.

Q: All right –

A: I see what Mr. Fowler says but I don't think that is –

I am a member, the National Trust – as the delegate of the Chairman of the Board. If you will recall the Chairman of the Board is the statutory member of the Advisory Council.

Q: Yes.

A: Chairman of the Board of the National Trust. And I am delegated – I am his designee. I have been attending the meetings of this Advisory Council over the past several years.

And I am not aware that this theory has ever been in any formal way a policy of the Advisory Council. I read this with some amazement, if I may say.

Q: Well, as a member of the Advisory Council do you think the statements are false?

A: False? No.

I think it is the case that the National Trust litigation program advances the interests of historic preservation, and I suppose that means "of the Advisory Council."

I don't know what the phrase "the Advisory Council has recognized" – what that means. I am not aware of any recognition. I don't know how it would do that except by somehow –

How they would recognize that, I am not sure. But I am not aware of any kind of corporate action on the part of the Advisory Council that recognizes anything about the National Trusts's efforts in litigation.

Q: Okay, you are not aware of that.

A: Certainly not.

Q: And in any event no such authority was ever presented to the Board that the National Trust would act on behalf of the Advisory Council –

A: No.

Q: – To litigate –

A: Your statement is correct.

Q: So that whatever is meant in there it is nothing that has ever been approved or adopted or accepted by the Board of Trustees.

A: Of the National Trust.

Q: Yes, sir.

A: That is true.

Q: And it has never been approved or adopted by the Advisory Council.

A: Not to my knowledge.

Q: You are a member of the Advisory Council.

A: Yes, I am.

Q: When did you first become aware of that affidavit?

A: In terms of reading it, within the last week or ten days.

In terms of knowing that it existed – I have known that Mr. Fowler gave a deposition in this case I suspect since more or less about the time that he did it. Although – it is the 13th of May. I don't think I knew it that soon. But I knew he was going to speak in this matter.

This is an issue, as I suspect you can tell from my tone, of some controversy between the Advisory Council and National Trust. We are not somehow litigation counsel to the Advisory Council and are not now and have never been.

That is why I say I am not particularly happy with this expression of a so-called agreement a comity agreement in the previous paragraph you read to me, because I am simply not aware that that is any sort of a formal construction.

So that this is Mr. Fowler's interpretation, and it is what it is.

Q: But it certainly is not your interpretation and you don't agree with it?

A: Well, my views on what the Justice Department policies are are largely irrelevant. But in terms of the role of the National Trust if this purports somehow to say that the National Trust acts as litigation counsel for the Advisory Council, that simply is not the case.

Q: Did you know that this affidavit was filed at the time of the National Trust's petition for intervention?

A: No, no.

Q: Did you know that it was filed in support of the National Trust's petition for intervention in Jobbers' Canyon?

A: I know that, in a very general way, yes.

Q: Was any action ever suggested by you that the affidavit should be withdrawn?

A: No, because as I think I indicated a few minutes ago I hadn't actually read this affidavit in terms – until within the last couple

of weeks. So that not knowing what it said I hardly would have moved to cause it to be withdrawn.

Q: Since standing is an issue and now that you know it, is it your position that it should be withdrawn?

A: Well, I think that – it would seem to me offhand that is Mr. Fowler's decision. I mean, this is his affidavit.

Q: But it certainly doesn't –

A: He is not speaking here on behalf of the National Trust. He is speaking as General Counsel of the Advisory Council, which is not us.

Q: But the General Counsel for the National Trust introduced that in evidence in support of its petition for intervention.

A: Decisions and exhibits that the General Counsel introduces I suspect is – happily, the reason that we have a General Counsel, Mr. North.

I don't know anything about the trying of our lawsuits in terms of affidavits and what would be introduced or not introduced.

Q: But you make the decision as to whether you should intervene.

A: I do, indeed.

(Exhibit 4011, 106:2-113:16).

I next turn to the impact upon the Advisory Council. Perhaps the main function of the Advisory Council is to conduct the so-called section 106 consultation. It should

be emphasized at this point that the section 106 consultation does not require private individuals, entities, or state or local governments to participate; rather, it is designed such that federal agencies are required to consult with the Advisory Council. When the Trust sues a federal agency or administrator to force consultation, two distinct and unfortunate results occur insofar as the Advisory Council and the consultative process are concerned.

First, the Trust has by virtue of such a suit arrogated unto itself the responsibility of policing the section 106 process as among the various federal agencies and instrumentalities. If federal agencies are to be called to account for alleged failure to consult under section 106 by other federal agencies or instrumentalities, the statutes and the legislative history assign this task to the Advisory Council, not the Trust. The legislative history of the statutes creating the Advisory Council and enacting the section 106 review process make it clear that Congress intended that if any federal instrumentality was to sue another to force consultation, it was the Advisory Council's responsibility to do so. This is a Congressional policy choice of singular importance.

Second, when the Trust decides to sue to force consultation, it immediately makes itself a litigant rather than an impartial member of the Advisory Council. Without doubt, the reason for placing the Trust, through its chairman, in membership on the Advisory Council was to provide the Advisory Council, and those federal agencies which consult with the Council, with the unique talents of the Trust. Inherent in the creation of the consultative process is an expectation that the process, and thus the members of the Council, will be *impartial*, for the Council

members are about the making of *public policy*. Indeed, Congress has explicitly recognized that "the Council's decisions on preservation questions that come before the Council represent a public interest determination, that assures that historic preservation needs are satisfactorily balanced with other public policy requirements." H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6405. Inherent in the making of salutory public policy is objectivity. It can scarcely be doubted that federal agencies which consult with the Advisory Council will have reason to question the very integrity of the consultative process if a congressionally chartered member of the Council, like the Trust, absent explicit authority from Congress, is at once litigating against the federal agencies to force consultation and at the same time purporting to act as an impartial conferee during the consultative process.

Finally, the carefully crafted legislative relationship between federal agencies, the Trust, the Advisory Council, the Secretary of the Interior, and the Attorney General regarding historic preservation matters is a relationship formulated to insure cooperation, not litigation, between the federal players. The Trust was created not to litigate against government entities, but rather as "[a] supplement [to] the Federal program of preservation." H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285, 2288 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949)). Throughout the legislative history of national preservation law subsequent to the

creation of the Trust, Congress "recogniz[ed] the necessity for a high degree of cooperation and coordination of Federal activities if the Nation is to enjoy both the fruits of progress and its heritage from the past." H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307, 3310. Congress continually sought to find means of "avoiding conflicts of administrative jurisdiction." *Id.* Thus, in addition to the specific adverse impacts upon the management of the Trust and the functioning of the Advisory Council, suits such as the one here, where in a sense the Trust threatens a federally funded park in order to save federally recognized historic warehouses, challenge an essential premise of federal preservation law as between federal entities – "a high degree of cooperation and coordination of Federal activities." *Id.*

(c)

The Trust argues that it has the capacity to sue because: the statutes do not explicitly prohibit such suits; the legislative history of the statutes creating the Trust contemplate public participation in historic preservation efforts; when the Congress enacted the Historic Preservation Act in 1966, and particularly the attorneys' fee section of the 1980 amendment, individuals and nonprofit corporations were authorized to bring enforcement suits, and at least one federal court has authorized attorneys' fees in favor of the Trust; and, despite the long litigation history of the Trust, the courts have not found capacity lacking, but the Illinois Supreme Court has held that the Trust has capacity to sue. I shall address each argument in turn.

The Trust argues that the statutes creating the Trust do not explicitly prohibit such enforcement suits. This statement is true as far as it goes. As I previously indicated, the statutes cannot, however, be read to authorize such suits against federal agencies.

The Trust is a nonprofit corporation, 16 U.S.C. § 468, with the power "[t]o sue and be sued," *id.* § 468c(b), "[t]o the extent necessary to enable it to carry out the *functions* vested in it by sections 468 to 468e [of title 16 of the United States Code]." *Id.* § 468c (emphasis added). The *functions* of the Trust are expressed in only one place, 16 U.S.C. § 468:

> The purposes of the National Trust shall be to receive donations of sites, buildings, and objects significant in American history and culture, to *preserve and administer them* for public benefit, to accept, hold, and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the *preservation program*, and to execute *such other functions* as are vested in it by sections 468 to 468e of this title.

Id. § 468 (emphasis added).

16 U.S.C. § 468a establishes a principal place of office for the Trust. 16 U.S.C. § 468b establishes the board of trustees for the Trust, which includes the Secretary of the Interior and the Attorney General as ex officio trustees. 16 U.S.C. § 468c describes the powers and duties of the Trust, without expanding the "functions." 16 U.S.C. § 468d authorizes the Trust to consult with the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments (which is not the Advisory Council). 16

U.S.C. § 468e has been repealed. The only description of "functions," therefore, occurs in 16 U.S.C. § 468.

The "preservation program" referred to at the end of section 468 appears to refer to the word "preserve," appearing earlier in the statute. This is because the word "them" is a pronoun referring to the nearest antecedent nouns with which it agrees in gender and number, to wit: "sites, buildings and objects significant in American history and culture." *Id.* § 468. It would appear generally therefore that the *functions* of the Trust are, at least primarily, intended to serve the goal of preservation of historic sites by acquisition, lease, contract, load or the like. Indeed the only place in the delineation of the Trust's powers where federal agencies are mentioned, is the power of the Trust, not to sue such agencies, but rather "[t]o contract and make cooperative agreements" with such agencies. *Id.* § 468c(g).

The statute is simply incapable of being plainly read to suggest that the Trust may sue federal agencies for the purposes of enforcing a regulation promulgated by the Advisory Council and forcing section 106 review, particularly when the Trust has not acquired, and will not in the future acquire, directly or indirectly by gift, purchase, contract, loan, or otherwise an interest in the property to which the regulation is said to apply.

The Trust next argues that the legislative history of the statutes creating the Trust indicates that the Trust, in 1949, was expected to "mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources.

It will fill the gap in the present system of Federal legislation in this field . . . ." Intervenor's Memorandum and Rule 20(D) Factual Statement in support of Motion for Partial Summary Judgment at 5 (emphasis deleted) (quoting H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 2285, 2288 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949))). From this history, the Trust argues that it was authorized to become an "activist," and presumably to sue federal entities. It must be emphasized that the quotation from the legislative history upon which the Trust relies is taken from a letter written by the Secretary of the Interior supporting legislation creating the Trust. *Id.* It can scarcely be believed that the Secretary of the Interior was supporting legislation authorizing the Trust to sue the Secretary when the Secretary made no mention of such a possibility. Obviously, Congress could not have contemplated that it was authorizing the Trust to sue the Secretary of the Interior, and other federal agencies, so as to enforce a regulation of the Advisory Council and to force a section 106 consultation, when the Advisory Council and the section 106 process were not written into law until long after the statutes creating the Trust were enacted. Moreover, the legislative history, as recounted earlier, simply cannot be read to support the Trust's conclusion that Congress intended to generally authorize the Trust to sue federal agencies when it created the Trust; in fact, the contrary conclusion is evident from the legislative history.

Further, the Trust argues that Congress intended for the Trust to be able to sue in cases such as this because

Congress authorized enforcement suits when it adopted the National Historic Preservation Act in 1966, and particularly because Congress authorized awards of attorneys' fees to private individuals and nonprofit corporations in 1980. 16 U.S.C. § 470w-4. *See* H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409; *National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, 570 F. Supp. 465, 468 (S.D. Ohio 1983). Neither 16 U.S.C. § 470w-4 nor the legislative history mentions the Trust. The issue in this case is not whether private enforcement suits are authorized, but whether Congress intended the corporation which it created to sue federal entities. The congressional explanation of the attorneys' fee provision does not discuss the Trust suing federal entities and is essentially limited to the uninformative statement that "[t]he intent is to ensure that property owners, non-profit organizations and interested individuals who may otherwise lack the means for court action be awarded reasonable costs for actions taken under this Act." H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409. It was in 1980, in the same legislation, that Congress explicitly discussed the Advisory Council suing federal entities, but Congress made no effort to amend or discuss the statutes governing the capacity of the Trust to sue federal entities. *Id.* at 6405. In the one case that the Trust was awarded attorneys' fees against a federal entity, the issue of whether the Trust had the capacity to sue federal entities was not raised, but rather the parties stipulated that if the Trust was entitled to fees the award should be paid by the federal defendants. *National Trust for Historic Preservation,*

570 F. Supp. at 467 (stating that "the parties stipulated that any award of attorney fees would be entered solely against federal defendants").

Finally, the Trust argues that it has instituted ten cases in the last nine years in an effort to enforce historic preservation policy, but the courts have not found a want of capacity. Further, the Trust argues that the Illinois Supreme Court has held that the Trust has capacity to sue to enforce historic preservation laws. These arguments are easily disposed of.

The issue of capacity has for the first time been raised by the Justice Department in this suit. Thus, the litigation history of the Trust is hardly persuasive since no federal court has been confronted with the issue. Moreover, the Illinois Supreme Court dealt with the capacity issue of the Trust in relationship to the Trust's standing to sue *only* nonfederal defendants regarding Illinois preservation law. *Landmarks Preservation Council v. City of Chicago*, 1988 Ill. LEXIS 122 (Ill. Sup. Ct., Sept. 22, 1988). The Illinois Supreme court thus had no occasion to consider the impact of the Trust's suit against federal entities and the related effect on the workings of the federal historic preservation program.

(2)

The nonfederal defendants also argue that the Trust lacks the capacity to sue them. While I agree that the wording of the Trust's functions in 16 U.S.C. § 468 does not seem to contemplate that the Trust has "functions" independent of situations where it has, or may acquire,

some type of economic interest in a specific historic property, I cannot conclude that the Trust lacks the capacity to sue the nonfederal defendants. I come to this conclusion essentially because there is no grave interference with the performance of a governmental function when the Trust sues nonfederal defendants. And, applying the liberal construction rules, *Loeffler*, 56 U.S.L.W. at 4555-56; *Burr*, 309 U.S. at 245, to the "sue and be sued" clause, 16 U.S.C. § 468c(b), I must find in favor of the Trust and against the nonfederal defendants on this issue.

Parenthetically, to the extent the defendants argue that the various corporate plaintiffs or intervenor failed to properly authorize the suit as a matter of simple corporate law, as for example where it is argued the board of directors did not explicitly authorize the suit, but delegated general litigation decisions to the president of the corporation, I have carefully reviewed the evidence on these questions. My understanding was, and is, that the capacity issue essentially related to whether Congress had authorized the Trust to sue, not whether as a matter of corporate law some act or omission had been taken or omitted by the corporate plaintiffs or the intervenor. (Filing 98, Memorandum and Order, May 20, 1988 (holding that the Trust should be authorized to intervene, stating the magistrate had "very serious concerns that the Trust may lack the capacity to sue by virtue of limitations inherent in the Act of Congress which created the Trust," but leaving the issue for resolution at a "later date")). In any event, I have carefully reviewed the evidence and arguments of the parties and conclude that the record adequately supports the conclusion that all corporate parties had the authority to institute this suit as a matter of

basic corporate law as distinguished from the Trust's lack of statutory capacity to sue federal defendants in a case such as this.

III.

The remaining issues for disposition – parties and conversion – are intertwined and thus will be disposed of together. Essentially the following intricate arguments are advanced by the plaintiffs and the intervenor:

1. Under the LWCFA grant documents with the State of Nebraska and the National Park Service, Douglas County was obligated to acquire fee title to Central Park East so that the property could be maintained as a public park in perpetuity as required by the grant documents and 16 U.S.C. § 4601-8(f)(3);

a. Douglas County acquired defective title to a portion of the Central Park East from the Burlington Northern Railroad because the Railroad could not convey fee simple title inasmuch as it obtained its title by condemnation in the late 19th century and, pursuant to Nebraska real property law, the Railroad acquired only a right to use the property which did not entitle the Railroad to convey fee simple title to Douglas County;

b. A title defect is the same as a conversion of Central Park East to a nonpublic outdoor recreation use;

c. The grant agreements and the LWCFA require the Park Service to take action to remedy the violation;

d. Once the National Park Service acts, or has a duty to act, to cure the violation, the provisions of the

NHPA and the NEPA are implicated, requiring an environmental impact statement or a section 106 consultation, or both, and the court should enjoin the parties from proceeding with the redevelopment agreement until the federal environmental and historic preservation statutory requirements are satisfied; and

2. Under the LWCFA grant documents with the State of Nebraska and the National Park Service, Douglas County was obligated to acquire fee title to Central Park East so that the property could be maintained as a public park in perpetuity as required by the grant documents and 16 U.S.C. § 4601-8(f)(3).

a. If Douglas County acquired good title to Central Park East, the deed to the County from the Railroad recited that the County was conveyed certain vacated portions of streets, the vacated portions of the street became part of the LWCFA section 6(f)(3) boundaries, and the City is condemning part of the vacated street as a part of the Redevelopment Agreement for purposes other than for use in Central Park East;

b. The condemnation is the same as a conversion of Central Park East to a nonpublic outdoor recreation use;

c. The grant agreements and the LWCFA require the National Park Service to take action to remedy the violation;

d. Once the National Park Service acts, or has a duty to act, to cure the violation, the provisions of the NHPA and the NEPA are implicated, requiring an environmental impact statement or a section 106 consultation,

or both, and the court should enjoin the parties from proceeding with the redevelopment agreement until the federal environmental and historic preservation statutory requirements are satisfied.

The defendants, of course, deny these arguments, and further contend that the plaintiffs and the intervenor have not joined as parties those persons who claim an interest in the real property for which the plaintiffs and the intervenor claim there is defective title, thereby requiring dismissal under Federal Rule of Civil Procedure 19. I turn now to a discussion of those arguments.

A.

I now examine the first argument of the plaintiffs and the intervenor. In an effort to acquire the property which would be used to establish Central Park East, the County took a special warranty deed from the Burlington Northern Railroad. (Exhibit 3000). There is no dispute that the county was required to obtain fee title to the real estate pursuant to the grant agreements existing between the County and the state, on the one hand, and the state and the Park Service on the other hand, except for an easement, limited to five years, which the County conveyed back to the Railroad with the approval of the Park Service and customary utility easements. (Vol. VIII, TR 1760:22-1762:17 (Testimony of Kenneth Compton)). There is further no dispute that any "conversion" of the property to a use other than for a public park would require the approval of the Park Service, and no such approval has been given. (Vol. VIII, TR 1765:18-1766:3 (Testimony of Kenneth Compton)).

The plaintiffs and the intervenor contend that the Burlington Northern Railroad did not own a "conveyable" interest in most, but not all, of the property at the time it delivered the special warranty deed to the County and "[t]hus the county has failed to comply with its obligations under the Land and Water Conservation Fund Act." Plaintiffs' and Intervenor's Post-Trial Brief on Title Issues and Necessary Parties at 2 [Hereinafter Plaintiffs' Post-Trial Brief]. I cannot agree with the arguments of the plaintiffs and the intervenor for the following reasons.

(1)

First, the plaintiffs and the intervenor assume in their argument that a title defect is the equivalent of a "conversion" by analogizing to an opinion of the Second Circuit Court of Appeals which, according to the plaintiffs and the intervenor, stands for the proposition that "a conversion includes instances in which '[p]roperty interests are *conveyed* for non-public outdoor recreation uses.' *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 451 (2d Cir. 1985) (quoting Dep't of Interior Memorandum, May 15, 1978) (emphasis in original)." Plaintiffs' Post-Trial Brief at 24. I do not agree with this assumption, nor do I agree with the analogy.

Simply because strangers to the County's title may prove a title defect (which can be assumed for the sake of argument only), it does not follow that a "conversion" has occurred or is reasonably threatened. Title defects in the abstract (no pun intended) fail to threaten the County, the Park Service or Central Park East in terms of the

property continuing to be devoted to outdoor public recreation as a park. Mr. Compton of the Park Service, in my view, properly defined when a conversion occurs, and that is when "the property or portions thereof is no longer used for public outdoor recreation purposes." (Vol. VIII, TR 1808:21-1809:1). Mr. Compton virtually recited verbatim the pertinent regulation cited by the plaintiffs and the intervenor, Plaintiff's Post-Trial Brief at 23-24, which states in pertinent part that the LWCFA property is to be "continually maintained in public outdoor recreation use." 36 C.F.R. § 59.3(a) (1988) (cited in Plaintiffs' Post-Trial Brief at 23-24 as 36 C.F.R. § 59.1(a)).

Put simply, there has been no "conversion" or threat of conversion established on this record, because the plaintiffs and the intervenor have failed to adduce *any* evidence that the "title defect" threatens to change the use of the park as a park. No evidence is presented on the record that there are real claimants asserting the alleged title defect in a manner which threatens to divest the County of title to the park or otherwise convert the use of the park from outdoor public recreation uses. The most that the plaintiffs and the intervenor have been able to do was to show, *after* the trial in this case had ended and the parties had rested, that a lawyer wrote a letter to the City, not the County, making some claim to some of the real property after apparently making some unspecified, but apparently gratuitous, offer of settlement to the County (filings 443 through 447). (The record was not reopened to receive additional evidence.) But, in any event, the City is not the County, and the County is the party responsible for maintaining the property as a public park. There has never been any showing before, during or after

trial that the County has been confronted with litigation over the claimed title defect to the property or that a claim has been submitted to the County, in the form required by state law, by real claimants putting the County on notice of a sincere claim. At this point the title defect, if there is one, is nothing more than a theoretical argument of lawyers for the plaintiffs and intervenor, which argument is asserted for purposes fundamentally irrelevant to the merits of the claimed defect, to wit, to force the Park Service to consult with the Advisory Council.

The reliance of the plaintiffs and the intervenor on *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 451 (2d Cir. 1985), is accordingly misplaced. In that case the Second Circuit held, among other things, that a "conversion" occurred because the easement for outdoor recreation was amended, so the court said, to allow a change "from public enjoyment of an unspoiled area to private golfing." *Id.* at 451. The threatened "conversion" discussed by the Second Circuit took the form of a specific document which amended the manner in which LWCFA property would be operated. *Id.* Here, however, there is nothing more in the record than the theoretical concern of the lawyers for the plaintiffs and the intervenor. Therefore, even if there were a title defect, on the record before me I find that the defect is not a conversion or a threat of conversion, because there is no evidence that the real property will in fact be used for something other than outdoor public recreation as a part.

In this regard, I note that the defendants presented substantial evidence to establish that it was unlikely that

the Park would be converted. This evidence takes two forms.

The County presented evidence that it received a special warranty deed to the Park from the Burlington Northern Railroad (Exhibit 3000). A special warranty deed is generally recognized to *warrant title* by the grantor to the property conveyed "against all claims which [the grantor] may have created at any prior time." 7 G. Thompson, *commentaries on the Modern Law of Real Property* § 3191, at 339 (1962 Replacement) (footnote omitted). What a special warranty deed does not do is warrant title as against the acts of persons who were predecessors in title to the railroad. *Id.* Here, the plaintiffs and the intervenor claim that title failed when the Burlington Northern Railroad "abandoned" its interest in the real property by attempted alienation: "When Burlington attempted to alienate its interest in 1984, for park purposes rather than railroad purposes, the abandonment occurred, and the property reverted to the servient estate holders." Plaintiffs' Post-Trial Brief at 6-7. In essence, the plaintiffs and the intervenor argue that the Burlington Northern Railroad could not "dispose of, alienate or even lease its easement for any purpose except for the operation of a railroad." *Id.* at 5 (emphasis deleted) (quoting *Roberts v. Sioux City & Pac. R.R.*, 73 Neb. 8, 22, 102 N.W. 60, 65 (1905)). Therefore plaintiffs and intervenor appear to argue that the Burlington Northern breached its warranty the moment it executed the deed.

For reasons more specifically discussed later, I question the applicability of *Roberts* to the facts here. But, at this point in the discussion, I believe that the special warranty deed is strong evidence that the Burlington

Northern Railroad believed that it had "some" title to convey to the park property it obtained solely by condemnation, at least to the extent that the Burlington Northern Railroad believed that delivery of the deed was not also a breach of its special warranty. For if the rational of the plaintiffs and the intervenor is accepted as being the law, the Burlington Northern Railroad, receiving over five hundred thousand dollars for the conveyance, would have known that it was in effect buying a lawsuit by giving a special warranty deed.

This is so because the special warranty deed warranted against acts of the Burlington Northern Railroad, and if the law were as the plaintiffs and the intervenor suggest, then the Burlington Northern would have conveyed by quitclaim deed, making no warranties whatever, and thereby avoiding any claim that the Burlington Northern Railroad breached its warranty in the special warranty deed that it had done nothing to impair the title. Note that the special warranty deed warrants that the railroad "is lawfully seized of such real estate," had "the legal power and lawful authority to convey the same," and "warrants and will defend title to the real estate against the lawful claims of all persons claiming the same or any part thereof through, by or under" the Railroad. (Exhibit 3000). The County and the Park Service thus have good reason to believe that the Burlington Northern Railroad will vigorously defend the title to the real estate against claims like those made by the plaintiffs and the intervenor, if real claims were ever made to take the park property from the County.

Next, the defendants presented evidence that the County received a title insurance policy in the sum of five

hundred and forty-three thousand dollars, insuring the County's fee simple interest in the park property. (Exhibits 3076, 3077, pages 2-4; Exhibit 4006; Vol VII, TR 1546:5-1588-8). Once again, like the Burlington Northern Railroad's special warranty deed, the title insurance policy is convincing evidence that if anyone attempted to take the park property from the County, the County would be vigorously defended by the title insurance company.

With regard to the title insurance policy, I pause to note a particular problem that occurred at trial. Pursuant to our Local Rules of Practice and the progression order in this case, the parties prepared a joint pretrial order and exhibit list. On the exhibit list prepared by the plaintiffs and the intervenor, those parties endorsed as *their* exhibits documents described by them as follows: Exhibit 3076, "Safeco title ins. policy 7/2/84" and exhibit 3077, "Title ins. policy w/FAX cover letter 6/13/88." The defendants did not object to these documents, and accordingly these exhibits were to be received into evidence without further offer, pursuant to the pretrial order. (Filing 429, paragraph I and page 6 of attached exhibit list).

At trial, the plaintiffs and the intervenor *objected* to the offer of their own exhibits, essentially because the exhibits did not contain the "boilerplate" for the title insurance policy. I denied these objections. Exhibit 3076 is a title insurance commitment, not, as listed, as title insurance policy. Exhibit 3077 is a "fax cover letter" with notes of a lawyer representing ConAgra together with the "guts," or principal endorsement pages, of the title insurance policy, but not the "boilerplate." (Exhibit 4006 is a duplicate of the principal endorsement pages obtained

from the files of the title insurance agent.) When the defendants recognized that the "boilerplate" to the title insurance policy was not attached to the exhibits they began, during trial, to locate a duplicate original of the entire policy. They were apparently successful. (Exhibit 4008). Then the defendants offered the duplicate original of the policy, and the plaintiffs and the intervenor objected. I sustained the objection because the "boilerplate" had not been endorsed on the pretrial order.

I received Exhibits 3076 and 3077 because there were no objections made to these exhibits at the time of the pretrial conference – which took place in the morning, with the trial commencing in the afternoon of the same day. Simply, the plaintiffs and the intervenor had their exhibits, knew what they contained, and listed them as exhibits which *they* intended to offer. Under the circumstances, the fact that the "boilerplate" was not included was evident to the plaintiffs and the intervenor. This was not a cause where the plaintiffs and the intervenor misunderstood the significance of their own documents, as this title issue and these exhibits were well known to the plaintiffs and the intervenor substantially in advance of trial.

Moreover, there is no doubt that a title insurance policy was issued, for there was a title insurance commitment. (Exhibit 3076). The pertinent schedules to the policy were before the court. (Exhibit 3077). Still further, the agent who wrote the policy testified that he issued the policy, and he compared Exhibit 3077 (the alleged pertinent schedules) with exhibit 4006 (a copy he kept of the pertinent schedules), and he was able to say that Exhibit 3077 was in fact a true copy of the pertinent schedules to

the policies. (Vol VII, TR 1546:5-1588:8). The agent was subject to extensive cross-examination. Therefore, I am not hesitant to conclude that, insofar as any threat of conversion is concerned, the title insurance policy provides convincing evidence that the County would be vigorously defended if a title claim were made.

On the other hand, the insurance "policy" was not used by me to credit the County with the statutory presumption that the County had offered prima facie evidence of title. Under the Nebraska statutes, once the *entire* policy was offered by the defendants, they would have established a prima facie case that title was in the County. Neb. Rev. Stat. § 25-1292 (Reissue 1985). The defendants failed to produce the "boilerplate" until during the trial, and there simply was no excuse for this failure. The defendants knew full well the need to have the entire policy if they were to take advantage of the statutory presumption, but they waited until after the trial started to provide opposing counsel with the entire policy. Out of simple fairness I thought it wrong to allow the defendants the statutory presumption when they had, without good excuse, failed to disclose, or even identify, the complete policy in the pretrial exhibit lists. I refused the offer solely for the reason that the "boilerplate" was not disclosed in the pretrial order.

(2)

Second, I find that the plaintiffs and the intervenor failed to prove a title defect because they failed to present evidence at trial establishing each link in the chain of title. I could not, therefore, conclude as a matter of fact

that the Burlington Northern Railroad did not have title at the time it conveyed, by special warranty deed, the park property to the County. Fundamentally there are four ways to prove title.

The first way to prove title is to put into evidence an abstract of title prepared by an abstracter duly licensed in Nebraska, in which event the abstract must show "each link in the chain of title," Neb. Rev. Stat. § 76-556 (Reissue 1986), and when each link is abstracted the abstract constitutes prima facie evidence of the documents so shown affecting title to real estate. *Id.* § 25-1292 (Reissue 1985). (An abstract of title is "a compilation in orderly arrangement of the materials and facts of record affecting the title to a specific piece of land, issued under a certificate certifying to the matters contained in such compilation." *Id.* § 76-537(1) (Reissue 1986).) The second way to prove title is to have prepared a policy of title insurance issued by a title insurance company licensed to do business in Nebraska, and when the title insurance policy is received it constitutes prima facie evidence of the ownership, liens, mortgages and interests which are indicated in the policy. *Id.* § 25-1292. Third, one may hire an expert witness to conduct a title search and then have the expert express an opinion on the state of the title pursuant to Federal Rules of Evidence 702 and 704. Fourth, one may prove title by copying all of the pertinent records which establish the chain of title and offer them in evidence, thereby, in effect, "abstracting" the record like an abstracter would do when preparing an abstract. Then the court is asked to apply the law to the facts representing the state of the title. The plaintiffs and the intervenor did not have an abstract of title prepared and did not have a

title insurance policy issued. Rather, the plaintiffs and the intervenor tried to establish the lack of title by having certain persons prepare limited title searches and alternatively by copying all pertinent records on file with the Douglas County Register of Deeds as shown by a tract index.

As to the limited title searches, these documents were not received for a number of reasons (*see, e.g.*, Exhibits 3072 and 3073; Vol VII, TR 1508:24-1511:25; Exhibits 3031, 3033, 3035, 3037, 3043, 3045, 3047, 3049, 3051, 3053, 3057, 3061, 3067, 3069, 3071, 3039, 3041, 3055, 3059, 3063 and 3065; Vol VII, TR 1661:18-1673:7). The title researches were prepared by Sherri Schrat and John R. Daum, representatives of two different title companies. The title searches are not abstracts, but are rather reports of title that express opinions of the title examiner. The title reports did not include judgment searches of the records of the clerk of the district court for Douglas County, Nebraska. Ms. Schrat is not a licensed abstracter, and someone else from the company where she worked signed the certificates which she prepared. Mr. Daum is a lawyer and an [sic] a licensed abstracter. He prepared some of the titles searches himself, and he directed someone under his supervision to do so with regard to other searches. These limited title searches were not received into evidence for a number of reasons, and, I shall discuss only two of the reasons here for purposes of brevity, the other reasons being stated on the record.

The title searches are written reports of the title examiner and purport to express an opinion as to title. Despite the clear requirements of the progression order in this case (filing 275) requiring each party to give the

information provided for in Federal Rule of Civil Procedure 26(b)(4)(A)(i), the plaintiffs and the intervenor did not designate anyone as an expert to testify as to title until long after the time to do so had run, and then they did so just before trial. About two days prior to trial, the plaintiffs and the intervenor attempted to obtain permission to designate, out of time, experts on the issue of title. Permission to do so was denied because the plaintiffs and the intervenor did not desire a continuance of trial so as to allow the defendants to be prepared to meet the late designation by discovery and counter endorsement of experts. (Filing 422). Therefore, at trial I refused to receive the title reports because the reports contained the expert opinions of the title examiners, the plaintiffs and the intervenor had failed to designate the experts within the time provided by the progression order, and I believed that the defendants would have been prejudiced. *See Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 258 (8th Cir. 1985) (stating, in a bench trial, that the exclusion of experts as a result of the failure to make appropriate discovery was not an abuse of discretion).

Next, I found that the title reports, as expressions of opinion, would not be helpful to the court, since the title searches were not predicated upon a full record search. There is no dispute that the title searches are limited, meaning that the examiner did not search the records of the Clerk of the District Court of Douglas County, Nebraska or the probate records of the Clerk of the County Court of Douglas County, Nebraska. Mr. Daum, the examiner hired by the plaintiffs and the intervenor, although giving somewhat different testimony during a deposition, explained that to determine title it would

have been "helpful" to have searched the records of the clerk of the district court for judgments and that he would not have issued a title insurance policy without doing a search of the district court records:

Q (by the court): Did you conduct a judgment search?

A: No, Your Honor.

. . . .

Q: If you were in the – are you in the business of issuing title insurance?

A: Yes.

. . . .

Q: Would you have issued a title insurance binder without conducting a search of the judgment records?

A: No.

. . . .

Q (by counsel for the plaintiffs and the intervenor): If you were trying to determine whether Douglas County obtained fee title through Exhibit 3000 [the special warranty deed from the Railroad to the County], would a judgment search have been necessary in your view?

. . . .

A: I believe a judgment search would have been helpful.

Q: Do you think it would have been necessary?

A: Possibly not.

. . . .

Q: Mr. Daum, can you think of anything that your firm could have done, any record that it could have searched which would change your opinion as to whether the County took fee title through the special warranty deed?

. . . .

A: Despite of [sic] what I may have testified during my deposition, I have to answer, yes, there may have been another place where we could have searched.

Q: Where would that be?

A: It would have been in the District Court.

Vol VII, TR 1663:22-1671:2).

The following is generally recognized in relation to Federal Rule of Evidence 705:

> If the Trial Judge believes that there is some chance that an opinion is based upon impermissible data, the Judge may order the witness to reveal the data before offering an opinion. The last clause of the first sentence [of Rule 705] authorizes this procedure, and it is likely that the Court will use its authority when a suggestion is made that the expert has considered unreliable information in reaching an opinion.

S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 701 (4th ed. 1986) (discussing Rule 705). In this case, even

if Ms. Schrat and Mr. Daum had been properly designated as experts, their opinions, expressed in the limited title searches, would have been virtually no value to the court.

In this case, the plaintiffs and the intervenor wanted Ms. Schrat and Mr. Daum to give expert testimony that the Burlington Northern Railroad did not have fee simple title to the real estate conveyed to the County at the time of the conveyance. Essentially, the plaintiffs and the intervenor believed that the Railroad, through its predecessor by merger, had acquired the property by condemnation in 1882, and the Nebraska Supreme Court had held that a railroad in Nebraska does not obtain fee title when acquiring property by condemnation. *See Lillich v. Lowery*, 211 Neb. 757, 759-60, 320 N.W.2d 463, 464 (1982); *Roberts v. Sioux City & Pac. R.R.*, 73 Neb. 8, 22, 102 N.W. 60, 65 (1905). Accordingly, the plaintiffs and the intervenor claimed that the fee simple title "reverted" to the heirs of the original condemnees when the Railroad "abandoned" the property by conveying it to the County. *See Roberts*, 73 Neb. at 22, 102 N.W. at 65. Therefore, a central question became whether anyone in the chain of title who were predecessors in interest to the County – the Railroad, the original condemnees or the heirs of the original condemnees – had done something to affect the title *after* the condemnation, upon which the Railroad relied in part for its claim of title, which either did or did not confirm title in the Railroad. It was critical that the records of the district court, not just those of the register of deeds, be searched and presented to the court. Otherwise, any title opinion would be grossly speculative.

In Nebraska, instruments between parties are valid even if not recorded with the register of deeds. Neb. Rev. Stat. § 76-238 (Reissue 1986) (stating: "*Provided*, that such [unrecorded] deeds, mortgages and other instruments shall be valid between the parties."). Before a judgment is entered, but after suit is filed, a lawsuit is itself, assuming service of process, notice to the litigants, and no lis pendens filed with the register of deeds is necessary to bind the parties to the suit. *First Nat'l Bank v. Young*, 124 Neb. 598, 601, 603-04, 247 N.W. 586, 587, 588 (1933); Neb. Rev. Stat. § 25-531 (Reissue 1985). Indeed, the Nebraska lis pendens statute is discretionary by its terms. Neb. Rev. Stat. § 25-531 (Reissue 1985). And "[w]hen the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title." *Id.* After a judgment has been rendered in the district court of the county where the real estate is situated, "[t]he lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from day which such judgment is rendered." *Id.* § 25-1305 (Reissue 1985). *See id.* § 25-1504. Still further:

> When any judgment or decree shall be rendered for a conveyance . . . and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance . . . had been executed conformable to such judgment or decree.

Id. § 25-1304.

Thus, an important question was whether the Railroad and the original condemnees and the heirs of the original condemnees had been parties to any litigation in the district court of the county where the land was situated regarding the title to the real estate, for if they had been, persons subject to a judgment of the state court would be bound to the judgment by Neb. Rev. Stat. §§ 76-238 (Reissue 1986), 25-1304, 25-1305 & 25-1504 (Reissue 1985), regardless of whether anything had been filed with the register of deeds. This is why Mr. Daum testified that he conducts a judgment search of the records of the clerk of the district court in the county where the real estate is situated – in this case Douglas County, Nebraska, – before he insures title, since by law parties in the chain of title – here either the railroad, original condemnees or the heirs of the original condemnees – are bound by decrees and judgments entered by the state district court, whether or not something is filed with the register of deeds. *Id.* §§ 25-1304, 25-1305, 25-1504 & 76-238. *See, e.g.*, Nebraska Title Standard No. 6 (providing that "[a]fter the service of process, the pending action is itself notice to all the world that persons dealing with the title will be bound by the result of the litigation. Thus, in every such case the examiner must look to the ultimate result of litigation as shown by the court records and not to the statutory notice [lis pendens] in order to pass upon the merchantability of the title"); Neb. Rev. Stat. § 76-556 (Reissue 1986) (providing that "[a] registered abstracter shall show each link in the chain of title, and failure to do so shall render him or her liable to any person injured by such omission. . . . When a registered abstracter relies upon the numerical index alone to refer him or her to all

entries upon the records affecting the title to property, such reliance shall be at his or her peril.").

For example, it would have been important to know whether the Railroad or its predecessor had commenced a quiet title action against the condemnees or the heirs of the original condemnees or vice versa. Neb. Rev. Stat. §§ 25-21,112 to -21,120 (Reissue 1985). Nowhere in the quiet title statutes is there any requirement that anything be recorded with the register of deeds. While there may have been a time in Nebraska when the statutes required that a quiet title decree be filed with the register of deeds to be binding against subsequent purchasers without notice, it has never been the law that parties to litigation are exempt from the provision of the quiet title decree if the decree was not recorded in the register of deeds office. *McCarthy v. Benedict*, 90 Neb. 386, 389, 133 N.W. 410, 411 (1911) (stating that under former law, a decree quieting title not recorded in the register of deeds office is not binding upon a person "who was not a party to the action to quiet title"). (There is no issue in this case as to whether a subsequent purchaser without notice would be bound by the decree; rather, the question here is whether such a decree was entered in favor of or against the Railroad or original condemnees and the heirs of the original condemnees). Under present law, it is clear that when all defendants having a record interest in the real estate are served with summonses and all defendants not having a record interest are served by publishing notice against the land, naming interested persons "real names unknown," the judgment and decree is "conclusive" as against them. Neb. Rev. Stat. § 25,21,113 [sic] (Reissue 1985).

At this point, it is helpful to realize that the legal principle relied upon by the plaintiffs and the intervenor is not clear; that it, I do not regard as clear the principle that under Nebraska law railroads were prohibited from acquiring fee simple title by condemnation in 1882, if that is what the railroad intended to acquire. It is plausible from the record that what the Burlington Northern Railroad's predecessor intended to, and did, acquire was in fact fee simple title. Thus, I do not regard the search of the records of the Clerk of the District Court to be an exercise in futility, but rather such an effort is an appropriate condition precedent to this court being asked to express an opinion on title. I shall explain.

The argument advanced by the plaintiffs and the intervenor is that the Burlington Northern Railroad did not have fee simple title to convey to the County because its predecessor by merger could not acquire fee simple title by condemnation. Neither the substantive grant of statutory power to condemn which was enjoyed by railroads in 1882 nor the 1882 award of condemnation make clear that the Railroad could not or did not acquire fee simple title. Although Nebraska cases decided after the award of condemnation in 1882 hold that when a railroad acquires a "rightway" it in fact acquires an "easement" allowing the fee to revert to the holder of the servient estate upon abandonment of the easement, no Nebraska case has been called to my attention that holds that a railroad intending to acquire fee simple title by condemnation was prohibited from doing so in 1882.

Exhibit 3116 is a copy of pertinent portions of the law governing railroads in 1882. At chapter 98, section 81 of

the Nebraska Revised Statutes, the statute seems to allow condemnation of the fee simple title to real estate:

> Such corporation . . . may take, hold, and appropriate so much real estate as may be necessary for the location construction and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains; *Provided,* That the lands held, taken and appropriated, otherwise than by the consent of the owner, shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth; *Provided further,* That no appropriation of private property, for the use of any corporation provided for in this subdivision, shall be made, until full compensation therefor be first made or secured to owners thereof.

Id. § 98-81 (1881), *quoted in* Exhibit 3116.

There is nothing about this statute which suggests that a railroad was prohibited from acquiring fee simple title by condemnation. Indeed, in Nebraska the general rule seems to be that when a statute does not explicitly prohibit a taking of fee simple title, then the question is one for the condemnation court to determine as to whether a fee simple condemnation is necessary to satisfy the public purpose for which condemnation authority is

granted. *Burnett v. Central Nat'l Pub. Power & Irrig. Dist.*, 147 Neb. 458, 470, 23 N.W.2d 661, 668 (1946).

Moreover, before the court is the Report of Commissioners in the condemnation proceedings held in 1882 (Exhibit 3001) which is at best ambiguous, if one credits the arguments of plaintiffs and intervenor, as to whether the predecessor of the Burlington Northern Railroad intended, or was granted, fee simple title. Exhibit 3001 provides in pertinent part that the Commissioners in order to:

> ascertain and report the amount of damages that the owners and lienholders of the property hereinafter described will sustain by reason of the *appropriation of the said property* by the [Railroad] *for* the *right of way for rail road tracks,* sidetracks, depot buildings *and general railroad purposes* . . . we did . . . inspect each and every lot and parcel of land with the improvements thereon . . . And we do assess and hereby return as the damages for the appropriation of the following several parcels of land and lots [there following being a description of various lot and parts of lots in blocks 125, 126, 131, 155, 156, 161, 132, 154, and 162, City of Omaha, Nebraska, together with an indication of whether improvements were situated thereon, and an appraised value per lot] Total Forty Eight thousand one hundred and twenty five Dollars. . . . [T]he improvements being appraised and set forth in connection with the lots, where there are any improvements thereon the amount of such improvements being set forth separately from the reality.

(Exhibit 3001 (emphasis added)). Exhibit 3001 then indicates that the County Judge certified the report as: "In the

matter of the petition of the [Railroad] for the appointment of a Commission to award damages due *for the appropriation of certain lands and lots . . . and of the whole thereof.*" (Exhibit 3001 (emphasis added)).

At the *very least* the report of commissioners and the certification of the county judge suggests that the "appropriation" was *of* "certain land and lots . . . and the whole thereof" to be used not only *for* a "right of way for railroad tracks," but also, among other things, for "general railroad purposes." At the *very most*, the plaintiffs and the intervenor have pointed out an ambiguity in the Report of Commissioners. On the one hand, the Report of Commissioners could be interpreted to mean that the "appropriation" was "for" a "right of way," or, on the other hand, the Report of Commissioners could as easily be interpreted to mean that the "appropriation" was "of" the described "land and lots . . . and the whole thereof" for use, as a "right of way for railroad tracks" and for "general railroad purposes." In other words, was the "appropriation" a "right of way," or was the "appropriation" the real property, and "the whole thereof"?

Accordingly, any competent title examiner would want to know whether the district court in Douglas County, Nebraska had been confronted with this question. For, if such a court had been confronted with such a question, the parties to such litigation would have been bound thereby for title purposes, as I have indicated earlier, whether or not something was filed with the register of deeds.

In this connection, the plaintiffs and the intervenor seem to suggest that no court could come to a conclusion

that no title defect existed due to the holdings of two Nebraska Supreme Court cases. This argument essentially begs the question, for it asks me to assume that the records of the clerk of the state district court contain no judgment adverse to the condemnees or their heirs. If the records of the clerk of the state district court contained such a judgment, then it would have been binding on the parties to the litigation, as I have indicated earlier, and there would be no "title defect." In any event, the two cases relied upon by the plaintiffs and the intervenor do not in my opinion stand for the proposition that railroads were prohibited from obtaining fee simple title in 1882 by condemnation.

The principal case relied upon by the plaintiffs and the intervenor is *Roberts v. Sioux City Pac. R.R.*, 73 Neb. 8, 102 N.W. 60 (1905), where the railroad *won* an adverse possession case because it was *undisputed* that the railroad had simply a right of way. In that case the railroad had condemned a right of way, ~~two~~ hundred feet wide, through farmland and had taken a deed for an easement for a right of way, two hundred feet wide, through other farmland. Later the owner of the land subject to condemnation, the same person who signed the deed and who also owned the adjoining farmland, sued, claiming that he had adversely possessed against the railroad and was entitled to use part of the right of way. There was no dispute about what the "appropriation" was in *Roberts*: "Defendants claim a right of way through plaintiff's land . . . . Plaintiff admits that they have a right of way . . . ." *Id.*, 73 Neb. at 10, 102 N.W. at 61. The Nebraska Supreme Court essentially concluded that since the railroad had only a right of way, or easement, the farmer could not

adversely possess against the railroad without giving unequivocal notice because the farmer owned the servient estate. The court stated:

> [A] railroad company acquiring its right of way by condemnation proceedings under the Constitution and laws of this state does not obtain fee title thereto. It secures merely an easement in the right of way . . . . The fee title and servient estate remains in the original owner . . . . In the very nature of things, the railroad cannot dispose of, alienate, or even lease its easement for any purpose except for operation of the railroad; and whenever the right of way is abandoned for that purpose it reverts at once to the owner of the servient estate. Such was the right obtained by the railroad company to the land in controversy in this case. Therefore it is not manifest to us how title or right to this easement of the company can be obtained by a third person by adverse possession . . . .

Id. at 23, 102 N.W. at 65.

It therefore appears doubtful to me that the Nebraska Supreme Court was confronted with the issue of whether railroads in 1882 were prohibited from acquiring fee title to real estate in a condemnation proceeding when such was the intent of the railroad. It should be remembered in this regard that Neb. Rev. Stat. § 98-81 (1881) uses the word "right of way" in the context of a "right of way over adjacent lands" and the use of the preposition "over" seems to imply a lesser taking than other grants of power described in the same statute, such as: "Such corporation . . . may take, hold, and appropriate so much real estate as may be necessary for the location construction and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots" and

the like. Neb. Rev. Stat. § 98-81 (1881). This distinction is particularly critical in this case because, unlike the two hundred foot right of way through farmland in *Roberts*, the railroad here condemned blocks in downtown Omaha, Nebraska, "and the whole thereof," some which contained improvements. For these reasons it would be inappropriate to extend *Roberts*, a case where there was no dispute about what the "appropriation" was, to this case, where the "appropriation" was arguable intended to constitute a fee simple taking.

At this point I note that the plaintiffs and the intervenor refer in their brief to a portion of the statutes existing in 1882 setting out one procedure for condemnation that refers only to a "right of way." Plaintiffs' Post-Trial Brief at 3-4 (quoting Neb. Rev. Stat. § 98-97 (1881)). From this, the plaintiffs and the intervenor argue that the only interest a railroad could acquire was a "right of way." In contrast, the defendants point out in their brief the provisions of Neb. Rev. Stat. § 98-95 (1881), which suggest to them that a county court could allow a condemnation of fee simple title, where the parties consent to condemnation, but disputed the damages. *Id.* at 78-79. Thus, the defendants argue that this other procedure was utilized in the instant case.

I am unconvinced by both arguments. First, it is not plain to me what procedure was employed in the instant case, and there is no factual record upon which one can adequately determine the matter because the 1882 condemnation proceeding does not refer to the procedural statute used, and the petition of condemnation is not a part of the record. Second, what I do know is that the *substantive* statute, Neb. Rev. Stat. § 98-81 (1881) does not

on its face seem to prohibit a condemnation of a fee simple interest, whether consent is given or withheld by the landowner, and, accordingly, I would be loath to interpret *either procedural* statute to limit the reach of the substantive statute, absent clear direction from the Nebraska Supreme Court. I find no clear direction from the Nebraska Supreme Court.

The second case relied upon by the plaintiffs and intervenor is *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982). In that case the court was asked to construe a deed that contained language granting a fee simple interest to some farm ground, "excepting the present right-of-way of the [railroad] across said lands." *Id.* at 759, 320 N.W.2d at 464. The right of way was one hundred feet wide, through an eighty-acre tract, and it had been acquired by condemnation. *Id.* at 758, 320 N.W.2d at 464. The issue, once again, was not whether the railroad had acquired a mere easement, as the parties agreed on this point: "[T]he facts do not seem to be in dispute. . . . The defendants allege in their cross-petition, which is admitted by the plaintiff's reply, that the 100-foot-wide strip of land previously described 'constituted an easement for a railroad right-of-way which easement terminated upon the abandonment of the railroad in 1976.' " *Id.* at 758-59, 320 N.W.2d at 464. Rather, the issue was whether a deed conveying a tract of land, excepting an easement over a portion of the ground, retains in the grantor, or conveys to the grantee, the fee simple title to the land underlying the easement. The court held that a conveyance of land, excepting an easement, also conveys the land underlying the easement to the grantee. In so holding, the court recognized *Roberts* and stated that "we have held that a

railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way," *id.* at 759-60, 320 N.W.2d at 464, and, quoting *Roberts*, emphasized that upon abandonment of the easement, the fee title " 'reverts at once to the owner of the servient estate.' " *Id.* (emphasis deleted) (quoting *Roberts*, 73 Neb. at 22, 102 N.W. at 65).

Essentially for the same reasons that I have concluded that *Roberts* is unpersuasive authority for the proposition that a railroad in 1882 was prohibited from acquiring fee title by condemnation when the railroad intended to do so, I conclude that *Lillich* is also unpersuasive for that same proposition.

I thus conclude that the limited title searches of Ms. Schrat and Mr. Daum would be of little value to the court. Put simply, absent a judgment search of the records of the clerk of the district court of the county wherein the real estate is situated looking for judgments in favor of or against persons who appear in the chain of title, one cannot express an opinion of value as to whether the Railroad, the original condemnees or the heirs of the original condemnees had or have fee simple title.

Next, I received into evidence copies of the register of deed indexes and documents referred to in the indexes (Exhibits 3003 through 3027A (*See* Testimony of George J. Buglewicz, Register of Deeds of Douglas County, Vol. VI, TR 1343:23-1366:14; Testimony of Lucille Wisinski, employee in the office of Mr. Buglewicz, Vol. VI, TR 1366:17-1381:9)); essentially, these copies are what Ms. Schrat and Mr. Daum would have examined when they conducted their limited title searches. I received these

exhibits into evidence because these records have relevance to establishing a partial chain of title, and were not other wise objectionable. Perhaps regrettably for them, the plaintiffs and the intervenor never supplemented these exhibits by judgment searches of the records of the clerk of the district court. Thus, for the reasons expressed above regarding the lack of usefulness of the title searches, I cannot simply assume, which is what the plaintiffs and the intervenor would have me do, that there is nothing bearing on the state of the title in the office of the Clerk of the District Court for Douglas County, Nebraska. The documents from the register of deeds office simply did not establish each necessary link in the chain of title.

I note that just before entering their rest at trial (Vol. VIII, TR 1788:8-1792:3), the plaintiffs and the intervenor did ask me to take judicial notice of the records of the District Court of Douglas County, Nebraska, or to appoint an expert for the court to conduct the judgment search. I declined both requests for a number of reasons, some of which I shall briefly restate. I emphasize that the plaintiffs and the intervenor were well aware that they had an obligation to designate experts as required by the progression order, but they failed to do so. When they asked for leave to designate experts out of time, just days before trial, the plaintiffs and the intervenor, when offered an opportunity for a continuance, declined the offer. (Filing 422). Thus, it appeared that the plaintiffs and the intervenor were trying to do indirectly what they could not do directly – and that was to supply the evidence for establishment of chain of title necessary to prove their claims by having the court do their work.

With regard to taking judicial notice of the records of the Clerk of the District Court of Douglas County, Nebraska, such a request was improper because: the "facts" were not generally known within the territorial jurisdiction of this court, and the "facts" were not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. Essentially, the plaintiffs and the intervenor asked me to personally examine the records of the clerk of the district court, determine whether or not there were records pertinent to their claim, and then take judicial notice of such records. The plaintiffs and the intervenor did not know what the records were or what they reflected, nor did I. The plaintiffs and the intervenor were asking me to search all the records of the district court for judgments since 1882 pertaining to the subject real estate (either a general judgment or a judgment pertaining to the subject real estate specifically) which were either entered for or against the Railroad or its predecessor, and the original condemnees or the *unnamed* heirs of the original condemnees. I note that no search of the probate records, maintained by the clerk of the *county* court, not district court, was done. Thus, it is impossible to determine who the heirs of the original condemnees were without a search of the probate records. Without knowing these names it would not be possible to ascertain whether a judgment was entered for or against them in the district court in favor of the Railroad or its predecessor, unless every file in the district court to which the Railroad or it predecessor was a party was examined. As a consequence, I believe that it would be improper to take

judicial notice of these "facts" under Federal Rule of Evidence 201(b) & (d).

Furthermore, since the plaintiffs and the intervenor had not timely endorsed their own expert, they requested that the court appoint an expert to examine the records and supply the evidence that they had declined to supply. There is no doubt that the trial would have been substantially delayed by the appointment of an expert if the procedures outlined in Federal Rule of Evidence 706(a) were to be followed, and, of course, such procedures would have been followed. The delay in the trial in light of the fact that the plaintiffs and the intervenor had once rejected a continuance is reason enough to refuse to appoint an expert. An even more compelling reason to deny the appointment of an expert is that it is not the proper office of a court-appointed expert in a civil case to provide evidence which the parties had every opportunity to provide, but failed to provide. This is not a case where the finder of fact is confronted with two divergent expert opinions, and the finder of fact requires the services of an objective expert to determine the validity of the competing position. Rather, this is a case where the expert is sought to prove an element that a party failed to prove. Such a procedure unnecessarily injects the court into the adversarial process and subverts the purposes of Federal Rule of Civil Procedure 16 requiring the parties to prepare in advance of trial and to comply with scheduling orders.

B.

I turn next to the second argument advanced by the plaintiffs and the intervenor that a conversion or

threatened conversion is about to take place. Essentially, the plaintiffs and the intervenor argue that if the Burlington Northern Railroad had title to the park property, the Railroad conveyed not only the property described in the metes and bounds portion of the legal description of the deed, but also its title to a portion of vacated streets lying adjacent to real estate described by metes and bounds (7th Street adjacent to Blocks 131 and 155). The City is now endeavoring to condemn a portion of the vacated streets, so claim the plaintiffs and the intervenor. Therefore, the plaintiffs and the intervenor argue that the County is allowing the City to convert the vacated streets from public outdoor recreation use to some other purpose by virtue of the condemnation. Plaintiffs' Post-Trial Brief at 18-21. The plaintiffs and the intervenor argue essentially that the County accidentally acquired more property than it thought it was acquiring, the park property is larger by one half of a vacated street, and the vacated street portion is being condemned by the City. Hence, a conversion has taken place of at least a portion of the park.

I need not decide the questions of intricate and arcane real property law dealing with vacation of streets, for the factual predicate for the conversion argument – that is, the County's interest is being condemned – is not supported by the evidence. The plaintiffs and the intervenor rely upon exhibits 3110 and 3111, which are copies of condemnation petitions, in support of their argument that a portion (east half of vacated seventh street lying adjacent to Blocks 131 and 155) of the County's park property is being condemned. Plaintiffs' Post-Trial Brief at 18. The problem with this argument is that the County

is not named as a condemnee on the relevant tracts, whereas every other interested person is so named (e.g., Exhibit 3111, First Amended Petition to Condemn, caption tracts 5A-5D, and paragraph 3, tracts 5A-5D). (The only condemnee related to the County is "Sam J. Howell, Douglas County Treasurer," and he is named apparently as a tax collector along with the Board of Equalization of the State of Nebraska.) Clearly, according to the theory of the plaintiffs and the intervenor, the County holds a record interest by virtue of recordation of its special warranty deed, in the same "County of Douglas." (Exhibit 3000). To properly name the County as a condemnee it would have to be described as the "County of Douglas." Neb. Rev. Stat. § 23-101 (Reissue 1987); *Jameson v. Plischke*, 184 Neb. 97, 99, 165 N.W.2d 373, 375 (1969). Thus, whatever the City is doing, the City does not threaten by condemnation any interest of the County, since the City did not name the County as a condemnee. *See* Neb. Rev. Stat. §§ 76-701 to -725 (Reissue 1986 & Cum. Supp. 1988) (describing the procedure for condemnation generally, and providing for notice to condemnees, Neb. Rev. Stat. § 76-706 (Cum. Supp. 1988)).

C.

The title issue raises questions of whether the original condemnees and their heirs must be made parties to the litigation such that the failure to join them requires dismissal of this case pursuant to Federal Rule of Civil Procedure 19(b). The defendants raise only arguments regarding these absent parties, and no others, and defendants argue that these parties are "indispensable" such

that the court cannot provide adequate relief. Post-Trial Brief of Defendants at 59-64.

I assume that this litigation has the potential to indirectly adversely impact upon the original condemnees and their heirs, and that joinder is not feasible under Federal Rule of Civil Procedure 19(a). However, the rule is well established that "[i]n litigation involving the adjudication of public rights, nonparties who may be adversely affected by a decision in plaintiff's favor do not have a protectable interest which would require their joinder." 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 19.07 [2. – 0] (2d ed. 1987). *See National Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (stating that, in an action brought by environmental organization seeking declaratory relief with respect to the issuance of preference right coal leases, the joinder of lease applicants was not required, since the plaintiffs were solely seeking vindication of the public rights embodied in the NEPA). Here the plaintiffs and the intervenor seek *solely* to vindicate public rights under NEPA and NHPA. I believe, therefore, that complete relief can be provided since the relief sought is not a declaration of specific rights to the real property, but rather compliance with NEPA and NHPA. Accordingly, I believe that joinder is not required and dismissal is not mandated under Federal Rule of Civil Procedure 19(b).

IV.

At trial the parties offered into evidence various depositions wherein certain objections were made, but

consented that I might defer ruling on these depositions until I could read them. I have reviewed the depositions, and now receive them into evidence, over the objections made, for whatever value the depositions may have, if any. (Exhibits 4011 through 4016). I have considered all dispositive motions made before, during and after trial, and to the extent that I have authority to rule upon such motions I deny them, and to the extent that I lack authority to rule upon such motions I recommend that they be denied, but that this case be decided upon these findings and recommendations and the previous findings and recommendations (filing 261).

IT IS RECOMMENDED TO THE HONORABLE WARREN K. URBOM THAT THE COURT:

1. find in favor of the defendants and against the plaintiffs and intervenor as provided for in these findings and recommendations and the previous findings and recommendations (filing 261), determining that:

a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA:

b. insofar as the ODF and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the NEPA or the LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon;

c. the Trust does not have the statutory capacity to sue the federal defendants, but the Trust does have the statutory capacity to sue the nonfederal defendants;

d. the Trust has standing for itself and its members to bring this action;

e. PROUD lacks standing for itself, but PROUD has standing for its members;

f. Roger Durand has standing;

g. Mercer Management Company has standing for itself;

h. the court has before it appropriate parties such that adequate relief can be provided by the court;

2. deny all dispositive motions at any time made by any party; and

3. enter final judgment in favor of the defendants and against the plaintiffs and intervenor, dismissing this case.

DATED this 20th day of January, 1989.

/s/ Richard G. Kopf
Richard G. Kopf
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al., Plaintiffs, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION, et al., Defendants.	CV88-0-247 MEMORANDUM ON PLAINTIFFS' AND INTERVENOR'S OBJECTIONS TO THE MAGISTRATE'S FINDINGS OF LAW AND FACT AND THEIR MOTION TO REJECT PART OF THE MAGISTRATE'S RECOMMENDATIONS (Filed Febr. 14, 1989)

The plaintiffs and intervenor have filed objections to the report and recommendations made by Magistrate Kopf following the second portion of a bifurcated trial, filing 468. The defendants, who filed their objections to the magistrate's findings and recommendations later than 10 days following the filing of the magistrate's opinion, objected to the magistrate's conclusion that each of the plaintiffs and the Intervenor had shown facts at trial sufficient to establish standing. I have reviewed the transcript of the trial and the portions of the magistriate's report that concern these issues and I conclude that the report contains no clearly erroneous findings as to the standing issues. Therefore, I shall adopt the magistrate's

recommendations as to the standing of P.R.O.U.D., Roger Durand, Mercer Management Company and the National Trust for Historic Preservation ("National Trust"). *See* Recommendations (d), (e), (f), and (g).

The National Trust, the intervenor in this case, has objected to the magistrate's finding that it lacks the capacity to sue the federal defendants. The magistrate determined that the National Trust had capacity to sue the nonfederal defendants, but he found that, despite its power "to sue and be sued" under 16 U.S.C. § 468c(b), the National Trust lacked capacity to sue the federal defendants because the Trust failed to overcome the obstacles to capacity that were outlined in *Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940). The magistrate determined that permitting the National Trust to sue federal defendants would be inconsistent with the statutory scheme for historic preservation in the United States and would constitute a grave interference with significant governmental functions. The federal defendants, who argued at trial that the National Trust lacked capacity to sue them, have since abandoned their position, filing 478.

The intervenor agrees with the basic approach used by the magistrate to determine whether the Trust has capacity to sue. As the magistrate recognized, any limitation on the power of the National Trust to sue or to be sued "cannot be lightly assumed." *Burr*, 309 U.S. at 245. The *Burr* test, which was reaffirmed in *Loeffler v. Frank*, 56 U.S.L.W. 4554, 4555 (U.S. June 13, 1988), established that "if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the

statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Burr*, 309 U.S. at 245.

STATUTORY LANGUAGE AND POLICY

Like the magistrate and the intervenor, I shall begin my analysis with an examination of the statutory language of 16 U.S.C. § 468 (1985):

> In order to further the policy enunciated in sections 461 to 467 of this title, and to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest, there is hereby created a charitable, educational, and nonprofit corporation, to be known as the National Trust for Historic Preservation in the United States, hereafter referred to as the "National Trust". The purposes of the National Trust shall be to receive donations of sites, buildings, and objects significant in American history and culture, to preserve and administer them for public benefit, to accept, hold and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the preservation program, and to execute such other functions as are vested in it by sections 468 to 468e of this title.

Upon considering this and the other language that constitutes the federal charter, the magistrate decided that the primary function of the National Trust is "to serve the goal of preservation of historical sites by acquisition, lease, contract, loan or the like." MFAR II, at 38.

The magistrate concluded that the statutory language is incapable of being read to suggest that the Trust may sue federal agencies for the purposes of forcing a section 106 consultation. He noted that the only place in the statutory provisions where federal agencies are mentioned is in section 468c(g), which refers to the Trust's power to contract and to make other cooperative agreements with federal agencies, and he found that this section emphasizes the need for a cooperative posture between federal agencies.

The intervenor argues that the only issue regarding its capacity to sue a federal agency concerns whether a function of the National Trust is to attempt to save historical buildings from demolition by lawsuit. Not surprisingly, the Trust answers its own question affirmatively and takes issue with the magistrate's narrow interpretation of the corporation's functions.

The policy enunciated in section 461, which is referred to in the first sentence of section 468, is "to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. The intervenor argues that the policy articulated in section 461, combined with the policy of "facilitat[ing] public participation in the preservation of sites, buildings, and objects of national significance or interest," indicates that a function of the National Trust is to institute lawsuits "to preserve [historical sites and buildings] for public benefit," regardless of whether the defendants are federal agencies.

I agree with the intervenor that, based solely upon an interpretation of the statutory language of the National Trust's charter, the primary function of the Trust is not as narrow as the magistrate's report implies. However, I also acknowledge that the breadth of the Trust's functions, including its right to sue and be sued, may be limited by the concerns expressed in *Burr*. A useful resource for determining whether *Burr's* limitations apply to limit the Trust's capacity to sue is the legislative history of the laws involving the nation's historic preservation efforts.

The legislative histories of four statutes have bearing on the issues presented in this case: the creation of the National Trust in 1949; the passage of the National Historic Preservation Act in 1966; and amendments to the latter in 1976 and in 1980, which includes the attorney's fee award provision. The magistrate and the intervenor devoted considerable attention to these documents in formulating their positions on the issue of the Trust's capacity. I have done the same.

In the interests of time and of judicial economy, I shall not repeat the legislative histories, except where necessary. Suffice it to say that I have read the documents that constitute the legislative histories of the above-listed statutes, including the portions that the magistrate relied upon in formulating his recommendation and including the portions that the intervenor relies upon in objecting to the recommendation. *See generally*, H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285; H.R. Rep. No. 1916, 89th Cong. 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307-3319; S. Rep. No. 1363, 89th Cong., 2d Sess. 1 (1966); S. Rep. No. 367, 94th Cong. 2d Sess., 33-34, *reprinted in*

1976 U.S. Code Cong. & Admin. News 2442; H.R. Rep. No. 1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409; and S. Rep. No. 943, 96th Cong., 2d Sess., 1 (1980).

I have also read the Illinois Supreme Court's opinion in *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 531 N.E.2d 9 (1988). I agree with the Illinois court's conclusion that the "National Trust must be allowed to maintain suits in State courts to prevent unlawful destruction of buildings it deems of national historic significance." *Id.* at ___, 531 N.E.2d at 14. However, I also agree with the magistrate's conclusion that this case is not particularly helpful in deciding whether the Trust has capacity to sue federal agencies since the defendants in that case were not federal agencies.

Based upon my review of the statutes, the legislative history, case law, and the trial transcript, I have decided to reject the magistrate's recommendation regarding the Trust's capacity to sue federal defendants. I find no evidence in the record that the Trust's capacity to sue a federal agency is inconsistent with the statutory scheme or presents a grave interference with the undertakings of a federal agency. I am not oblivious to the difficulties that may be presented when the Trust sues the director of a federal agency who is also a statutorily designated member of the Board of Trustees. However, I do not think it has been shown that the Secretary of the Interior cannot simultaneously perform his duties as secretary and as a Trustee. The problems that were identified by the magistrate do not rise to the level that is required by *Burr* and *Loeffler*.

The issues raised in *Burr* and *Loeffler* concern the scope of the federal instrumentalities' "sue and be sued" clause. This case assumes a posture different from those cases because this case concerns the National Trust's right to initiate a lawsuit, rather than a federal agency's exposure to suit.

FEDERAL INSTRUMENTALITY

As a preliminary matter, I shall address the intervenor's argument that it is not, as the magistrate's findings reflect, a federal instrumentality. Because the character of the National Trust is important to the ultimate resolution of this capacity issue, I shall analyze its nature. The National Trust contends that it is a private, nonprofit corporation. It notes that its activities are not subject to review by the federal government, that it is not bound by the requirements of the Administrative Procedures Act, that it is independently run by its Board of Trustees who are not appointed by the President, that it is not represented by the Justice Department, and that the Court of Claims has determined that it is not a federal entity for purposes of the Tucker Act, *see Chas. H. Tompkins Co. v. United States*, 230 Ct. Cl. 754. (1982).

The Trust's charter refers to it as "a charitable, educational and nonprofit corporation," *see* 16 U.S.C. § 468, and I note that three of the members of its Board of Trustees are statutorily required to be public: the Secretary of the Interior, the Attorney General and the Director of the National Gallery of Art, *see* 16 U.S.C. § 468b.

I observe that the Trust is not one of the "private corporations established under Federal law" that are listed at 36 U.S.C. § 1101, and that Congress did not designate the Trust as such in its Federal charter, as it did with the National Fish and Wildlife Foundation, *see* 16 U.S.C. § 3706. Though it is not purely private, the Trust possesses many of the qualities identified by the Supreme Court as indicative of private status.

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. 5061 (U.S. June 25, 1987), the Court considered whether the USOC activities could constitute state action for purposes of an action under 42 U.S.C. § 1983. While it is true that the USOC is listed as a private corporation created under federal law in 36 U.S.C. § 1101, the factors that the Supreme Court considered in analyzing the nature of the USOC may aid my analysis of the nature of the National Trust. The Court stated:

> The fact that Congress granted it a corporate charter does not render the USOC a government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.

Id. at 5067. The court also found that Congress' intent to aid the USOC with funding did not make the entity the government's agent. "That a private entity performs a function which serves the public does not make its acts [governmental] action." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). In describing the federal charter for the USOC, the Court stated:

> The Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct not the coordination of amateur sports has been a traditional governmental function. . . .'Normally [a government] can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'

Id. at 5067 *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Like the USOC, the National Trust does not become a federal entity based solely upon its federal charter, and like the USOC, the National Trust does not become a federal entity by virtue of its eligibility to receive federal matching grants-in-aid. Moreover, historic preservation efforts have not traditionally been a governmental function and, in fact, the Congress has made it clear in the legislative history that the private individuals and organizations are better equipped to pursue these efforts.

Given this information, I am inclined to believe that the National Trust, albeit with three public Trustees on its Board, is more private than public in nature. My inclination is affirmed by the legislative history of subsequent acts touching on the historic preservation effort. In the legislative history from the National Historic Preservation Act in 1966, a letter from the Secretary of the Interior was included in the Senate Report. The letter stated in part:

> It [the National Trust] is the only *nongovernmental* body operating on a nationwide basis in the historic preservation field.

S. Rep. No. 1363, 89th Cong., 2d Sess. (1966) at 13 (letter from Stewart L. Udall) (emphasis added). When the attorney's fee provision was passed, permitting all interested persons who "substantially prevail" in a suit brought under the NHPA to obtain their fees, the House report stated that the "any interested persons" referred to individuals and "non-profit organizations" who prevail. H.R. Rep. No. 1457, 96th Cong., 2d Sess. (1980). By the language of its charter, the National Trust is a nonprofit organization. 16 U.S.C. § 468.

It seems to me that the magistrate's primary concern was with what he saw as the clear intent of Congress that federal agencies and instrumentalities should work in cooperation to achieve the goals of historic preservation. He relied on the matching grants-in-aid provision for the Trust, the development of the consultation process under section 106, and the original character of the Advisory Council as solely "advisory." He also maintained that Congress' intent in creating the Advisory Council was to present a forum where unbiased and objective decisions could be reached.

Congress' demand for cooperation is also evident, according to the magistrate, in its decision to designate the Attorney General and the Secretary of the Interior to sit on the National Trust's Board of Trustees and in designating the Chairman of the National Trust and the Secretary of the Interior as members of the Advisory Council. The magistrate concluded that "[q]uite clearly," Congress did not intend for the Trust to be independent.

Magistrate Kopf also considered the fact that Congress withdrew the Attorney General's statutory membership of the Advisory Council at the same time that Congress permitted the Advisory Council to institute legal proceedings under the NHPA as indicative of Congress intention to keep federal agencies that have the power to sue separate from the Justice Department. The intervenor pointed out, however, that the Attorney General was removed along with several other members of the Board of Trustees in an attempt to decrease the total Board membership. *See* S. Rep. No. 943, 96th Cong., 2d Sess. at 13.

Though Magistrate Kopf's observations about the contents of the legislative histories are accurate, I disagree with the inferences that he has drawn from them. The *Burr* test requires a court to make legal and factual determinations with regard to the reality of the situation. The defendants presented no evidence to demonstrate that the Secretary of the Interior, Mr. Hodel, feels that his statutory duties as secretary of the Interior are inconsistent with his duties as a Trustee. Nor have the defendants shown that Mr. Hodel's duties as the secretary pose a grave interference to his ability to meaningfully participate as a Trustee or that his status as a Trustee poses a grave interference with his duties as secretary. In short, there has been no demonstration that the Secretary is unable to perform his statutory duties satisfactorily. The defendants' challenge to the Trust's capacity, therefore, must fall of its own weight.

DEFECTIVE TITLE TO THE PARK LAND

The other major issue presented in this second phase of the trial pertains to whether Douglas County's title to

the majority of the land that is now part of the park property is defective in any way, and if the title is defective, then whether the defect constitutes a conversion of the land under the LWCFA. The intervenor and the plaintiffs object to the magistrate's conclusion that defective title was not proved. They rely heavily upon certified records from the Douglas County Register of Deeds office, upon an abstractor's certificate compiled by Frank J. Drelicharz in 1983, and upon Drelicharz's testimony to show that defective title exists.

The magistrate ruled before trial and again at trial that the title searches performed by Sherri Schrat for the Omaha Development Foundation, a defendant, were privileged under the work product doctrine and, therefore, the plaintiffs and intervenor were precluded from using evidence regarding the searches or the conclusions that Mrs. Schrat drew from them at trial. He also decided that certain testimony by Mrs. Schrat, if allowed into evidence, would not constitute lay opinion under the Federal Rules but rather would constitute expert testimony. However, because the parties had not designated her as an expert in the pretrial order, she would not be allowed to testify in that capacity. *See* filing 420, and MFAR II at 1508-1511.

The plaintiffs and intervenor object to this ruling for many reasons. They argue that the searches were performed before the title defect became an issue in the case, and that in any event, ODF waived the privilege by its actions. Specifically, they contend that other title searches that were performed by Mrs. Schrat had been provide to the plaintiffs and intervenor in discovery and that Mrs. Schrat stated that no greater degree of secrecy pertained

to the searches in question than to the previously disclosed searches. Additionally, they contend that Mrs. Schrat testified that she discussed the conclusions that she had drawn from the searches in question with other parties, including Drelicharz and an attorney for the plaintiffs and intervenor.

I conclude that the magistrate's decision not to receive the evidence was proper for the reasons that he provided at trial. The plaintiffs and intervenor apparently have argued nothing new in their brief to me, and I do not find their original arguments any more persuasive than did the magistrate. With this evidentiary objection out of the way, I shall consider the substantive objections.

The magistrate's findings first addressed whether a conversion may occur under the LWCFA based on a possible defect in the title. He found that a theoretical title defect fails to threaten the County's title to the land because in a theoretical situation, there is no evidence that the property would be converted to any use other than public outdoor recreational use as a park. He stated that the plaintiffs and intervenor failed to adduce any evidence that the title defect threatened to change the use of the park, noting that they were unable to demonstrate that there were any real claimants who threatened to divest the county of title or otherwise to convert the use of the land. Although he made reference to a letter from an attorney that was addressed to the City, which the plaintiffs and intervenor asked him to receive after the record had been closed, the magistrate decided not to allow the letter into evidence. Stating that the conversion argument was nothing but theoretical, the magistrate

concluded that the plaintiffs and intervenor did not satisfy their burden of proof on the conversion issue.

Since January 20, 1989, the date the magistrate filed his findings and recommendations, a petition to quiet title to some of the land in question in this case has been filed in the Douglas County District Court. The plaintiffs and intervenor have filed a motion asking me to accept further evidence in this case. Although the time allotted for the defendants to respond to the motion has not yet expired, I shall proceed as if the evidence were received, because I find that it would not significantly bear on the outcome of this case. The petition to quiet title indicates that a part of the plaintiffs' and intervenor's conversion argument has become more than purely theoretical. Nevertheless, I agree with the magistrate that the assurances provided by the title insurance alleviate the threat to conversion.

The magistrate found that even if the plaintiffs and intervenor could show that a defect existed, they did not show that the defect would constitute a conversion under the LWCFA. The magistrate rejected their use of *Friends of Shawangunks v. Clark*, 754 F.2d 446, 451 (2nd Cir. 1985)[1] and found that the County's possession of a Special Warranty Deed and the evidence that the County had title insurance demonstrated that the County's title to the land would be rigorously defended. He noted that the Special Warranty Deed gave the County at least two assurances.

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[1] The plaintiffs and intervenor cite *Friends* for the proposition that a conversion includes instances in which "[p]roperty interests are conveyed for non-public outdoor recreational uses." *Id.* at 451. (emphasis omitted).

First, that the railroad was lawfully seised of the land that it conveyed and, second, that the railroad would defend its title against any lawful claims made through, by or under the railroad. He put significant weight upon the fact that the County had procured title insurance on the land in the amount of $543,000 that could be used to satisfy any claims arising from a claim of title defect. *See* Exhibit 3076. This discussion seems to me to address the "real question" that was identified in the plaintiffs' and intervenor's brief: Can the County *assure* the National Park Service that it has title, control or tenure over the land? Plaintiffs' and Intervenor's Brief at 58. *See* 16 USC § 460l-8(f)(3). The magistrate's conclusion is that the County can assure its control over the land, and based on the evidence, I cannot say that this conclusion is clearly erroneous.

The magistrate also concluded that, in any event, the plaintiffs and intervenor failed to show chain of title in another and, therefore, they failed to show that there had been a conversion under the *Friends* case. As the magistrate found, four methods of presenting prima facie evidence of title exist in Nebraska: by having an abstract prepared by a licensed abstractor, by providing a complete title insurance policy, by hiring an expert to perform a title search and to give an opinion as to the title at trial, and by copying and having received into evidence all pertinent public records that show proper title. The magistrate determined that the plaintiffs relied on limited title searches performed by nonexperts, some of which were not received by him at trial, and upon certified records from the Register of Deeds office in Douglas County to

establish title. He decided that neither of these methods was effective.

Magistrate Kopf noted that in Nebraska instruments concerning land may be valid between parties even if they are not recorded, Neb. Rev. Stat. §76-238 (Reissue 1986), and that the land of a debtor is bound by the judgment of any court in Nebraska, Neb. Rev. Stat. § 25-1304 and § 25-1305. He concluded that the plaintiffs and intervenor failed to prove that a defective title exists, primarily because there was no evidence that any qualified person performed a search of the judgment books of the Douglas County District Court.

The intervenor and plaintiff argue, however, that the Burlington Railroad lacked the power to deed title to the land to the county since, under the Nebraska Constitution and Nebraska case law including *Lillich v. Lowery*, 211 Neb. 757, 320 N.W. 2d 463 (1982) and *Roberts v. Sioux City & Pac. R.R. Co.*, 73 Neb. 8, 102 N.W. 60 (1905), a railroad that takes a right-of-way in land by condemnation receives only an easement in the real estate for railroad purposes, and that the rights in the land revert to the servient estate upon abandonment by the railroad. The plaintiffs and intervenor rely on Exhibit 3001, the Report of the Commissioners from 1882, which, they say, indicates that the Burlington Northern's predecessor obtained a right-of-way to the land that now constitutes part of the land to be used for the park. The plaintiffs and intervenor contend that in 1984, when the Burlington Railroad transferred by Special Warranty Deed the land that had constituted its right-of-way, the railroad abandoned its easement and the rights in the use of the land

reverted to those who owned the servient estates in 1882 and their heirs.

The *Lillich* and *Roberts* cases did not persuade the magistrate that the only interest that the Burlington Northern's predecessor could have obtained in 1882 was an easement. The transfer between the original condemnees and the railroad took place in 1882, before *Lillich* and *Roberts* were decided by the Nebraska Supreme Court, and under a statute that was not in effect at the time those cases were decided. He found that the statute was open to an interpretation that would have provided for the railroad to take greater rights in the land than an easement, including the possibility that the railroad was to receive a fee title interest in the land. I agree that the statute in place in 1882 need not necessarily be construed in the narrow manner that subsequent statutes were construed by the Nebraska Supreme Court.

The plaintiffs and interveners contend that the defective title is established by Drelicharz's testimony and Exhibit 3078. The exhibit is an abstractor's certificate that was completed in 1983 pursuant to an investigation that preceded the issuance of title insurance in favor of the County. The plaintiffs and intervenor emphasize that Drelicharz, who is a licensed abstractor, testified that he completed judgment searches, a probate search and a tax lien search in connection with the issuance of the abstractor's certificate.

I observe that Exhibit 3078, the product of Drelicharz's title search that is in evidence, is an abstractor's certificate. It is not an abstract and it does not constitute copies of all the pertinent records. Drelicharz was not

designated as an expert at the pretrail conference, though he is a licensed abstractor. I see no way that Exhibit 3078 and Drelicharz's testimony can suffice to prove title in Nebraska. Thus, I agree with the magistrate's conclusion that the plaintiffs and intervenor have failed to show a title defect and that they have failed to show a conversion under the LWCFA.

OTHER ISSUES

The magistrate took little time to conclude that the County's interest in the east half of vacated Seventh Street, which adjoins portions of blocks 131 and 155, is not in jeopardy based on the City's condemnation action since the County is not a defendant in the action. Exhibits 3010 and 3011. I agree. I also agree with the magistrate's conclusion that all necessary parties were joined in this action, because the action involves public rights and, therefore, joinder is not required.

Dated February 14, 1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD), *et al.*, Plaintiffs-Appellants, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor-Appellant, vs. INTERSTATE COMMERCE COMMISSION, *et al.* Defendants-Appellees.	CASE NO 89-1342 NE OMAHA DEVELOPMENT FOUNDATION'S MOTION AND MEMORANDUM TO DISSOLVE THE INJUNCTION DATED MARCH 1, 1989, OR TO REQUIRE THE PLAINTIFFS AND INTERVENOR TO POST A SUFFICIENT SURETY BOND

COMES NOW the Defendant-Appellee, Omaha Development Foundation ("ODF"), a Nebraska non-profit corporation, and moves the Court for an order dissolving the injunction in these proceedings dated March 1, 1989, prohibiting the demolition of the John Day Company structures (3) ("John Day Buildings"), the Wright & Wilhelmy Building "(Wright & Wilhelmy Building"), and the New Idea Building ("New Idea Building") In the alternative, ODF moves the Court to require the Plaintiffs and Intervenor, as a condition for the continuation of such injunction, to file a bond as hereinafter described pursuant to Rule 8(b) of the Federal Rules of Appellate Procedure in favor of ODF to cover the damages which

ODF will sustain as a result of the issuance and continuation of the injunction. In support of this Motion, ODF states as follows:

1. ODF is a Nebraska non-profit corporation which was formed in 1980 and for the past nine years has been engaged generally in community development programs and activities in the Omaha, Nebraska, metropolitan area. For the past two years, ODF has specifically been involved in the development of the Riverfront Area of the City of Omaha. In this regard, ODF has been involved in implementing the Riverfront Development Plan ("Riverfront Development Plan") for the construction of the Riverfront Redevelopment Project (the "Project") described in the Plaintiffs' Complaint herein. The Project provides for the redevelopment of an area of downtown Omaha bounded roughly by Tenth Street on the West, the Missouri River on the East, Douglas Street on the North, and Leavenworth Street on the South, but does not encompass any of that area currently included in the area of downtown Omaha commonly referred to as the Central Park Mall. As part of the Project, ODF acquired the twenty-two buildings in Jobbers Canyon and is the property owner most directly affected by the injunction herein. Of the twenty-two buildings in Jobbers Canyon, all but five have been completely demolished or are substantially demolished beyond the point of repair. Of the total floor space originally in Jobbers Canyon, less than twelve percent (12%) remains to be demolished. Photographs taken on March 22 and 24, 1989, showing the present condition of the Project and a scale model of the finished Project are attached hereto marked Exhibit A.

2. With respect to the remaining buildings in Jobbers Canyon, namely, John Day Buildings, Wright & Wilhelmy Building and New Idea Building, all of which are now the property of ODF and which were purchased by ODF for development purposes, ODF states as follows:

John Day Buildings.

ODF was originally advised that the former owners and occupants of the John Day Buildings would vacate the John Day Buildings on or about May 21, 1989. Based on this information, ODF previously advised the District Court that demolition of the John Day Buildings would commence on or about May 21, 1989, or sooner if the buildings became available. As shown in the attached notice marked Exhibit B, the former owners and occupants of the John Day Buildings have vacated the south building effective as of March 22, 1989, and further have advised ODF that they will vacate the two north buildings on or before April 10. Thus, the south John Day Building is available for demolition immediately, and the remaining two north John Day Buildings will become available for demolition on April 10, 1989.

ODF must commence demolition of the John Day Buildings as soon as possible. In this regard, the John Day Buildings and the John Deere Warehouse share a common wall which must be removed to complete demolition of the John Deere Warehouse. In its present, partially demolished condition, the John Deere Warehouse Wall which stands eight stories in height presents a clear danger from falling debris or collapse, and should be removed as quickly as possible. ODF anticipates that the John Deere Warehouse Wall will be removed on or before

April 2, 1989. Following the removal of the wall, the shed type roof enclosing the alley and parking space between the John Deere Warehouse Wall and the John Day Buildings will be exposed on the east side and supported by temporary supports so that it should be removed as quickly as possible to avoid any additional danger from collapse or vandalism.

Prior to the filing of the appeal herein and at the present time, ODF was and is in active negotiations with four potential hotel developers for this site of the John Day Buildings. ODF has advised all of these developers that the site would be cleared and available for their construction this summer. Any delay in the demolition of these buildings will have a material impact on the ongoing negotiations which ODF has with these developers and will substantially reduce potential ODF demolition and landscaping cost savings by precluding hotel development on this site in this construction year. These savings, estimated to be $350,000.00, include the costs which would be saved if the site were immediately turned over for development so as to avoid the expense of filling and landscaping the excavation site. Any delay in the hotel which is planned and needed as part of the Project will cause ODF extreme financial hardship in the recovery of its investment in the Riverfront Project, and an extended delay will cause ODF's bankruptcy. Also, any delay will adversely affect the negotiations on the hotel site due to the announced policy of the Board of Governors of the Federal Reserve Board to increase interest rates.

Furthermore, the completion of the hotel project by ODF is necessary to reduce ODF's interest expense to the Peter Kiewit Foundation which is $60,000.00 per year for the portion of the loan allocable to the hotel site. Also, the

proceeds from the successful, timely completion of the hotel project will reduce ODF's $2,700,000.00 loan from First National Bank which is subject to an annual interest charge of 8.5% or $230,000.00 per year. The minimum additional interest expense of ODF resulting from the loss of the 1989 construction season for one year is a total of $290,000.00.

B. Wright & Wilhelmy Building

The demolition of the Wright & Wilhelmy Building must be commenced on or before May 21, 1989, to permit required utility relocations and the reconstruction of Jackson and Jones Streets between Ninth and Tenth Streets. The Jackson-Ninth to Tenth Street segment is needed to provide reasonable access to the Union Pacific Railroad Dispatching Facility, as well as the various Union Pacific Railroad and ConAgra employee parking areas located south of Jones Street. This access must be available upon occupancy of both the Union Pacific Railroad and the ConAgra Buildings which will occur during the spring and summer of 1989. A delay in the demolition of the Wright & Wilhelmy Building beyond May 21, 1989, will result in the inability of Union Pacific Railroad Company and Conagra to reasonably occupy their buildings and will substantially increase demolition costs, which increase is estimated to be $110,550.00 for premium overtime rates and lost salvage rights to attempt a complete demolition in a timely manner.

C. New Idea Building

To secure possession of the New Idea Building, prior to the issuance of the injunction herein, ODF terminated all tenants' leases in the

New Idea Building and the related rental payments of $6,000.00 per month. For the same reason, ODF paid $48,000.00 to tenants of the New Idea Building to obtain early terminations of existing, fixed term lease agreements. As a result of the injunction in the proceedings, ODF has been and will continue to be deprived of the early possession of the New Idea Building which it sought and for which it paid. Thus, as a result of the foregoing, ODF has sustained damages in the amount of $48,000.00 plus $6,000.00 per month for each month that the injunction continues.

At the present time, it is anticipated that the former owners, occupants and tenants of the New Idea Building will complete the removal and salvage of their property from the interior of the premises and completely vacate the premises on April 1, 1989. Under the terms of ODF's purchase agreement for the New Idea Building, the former owners of the building also reserved the right to remove and salvage the exterior windows, doors and roof hatches, and the former owners plan to complete such exterior work prior to May 1, 1989. Any interference with the former owners' salvage rights to the New Idea Building will obligate ODF to reimburse such former owners for the value of such lost salvage rights. In this regard, the total salvage rights are valued in the purchase contract for the New Idea Building for $150,000.00

Accordingly, the New Idea Building will be available for demolition on May 1, 1989. The demolition of the New Idea Building, which is immediately adjacent to the Wright & Wilhelmy Building, must commence on or before May 1, 1989, for the same reasons as are set forth above in subsection B. Any delay in the demolition of the New Idea Building will create, in addition to the problems and increased expenses described

in this subsection, the same problems and cause ODF the same increased expenses as are described above in subsection B.

3. In addition to the foregoing factors, generally any delay in demolition will cause ODF to be the owner of several vacant, older buildings, and such structures have historically presented an invitation for vandalism, unauthorized entry and fire. This situation creates a potential safety hazard, as well as an unacceptable liability and property damage exposure for ODF, with increased annual insurance premiums of approximately $40,000.00.

4. The injunction which was entered by the Court herein on March 1, 1989, was based upon the express representation of the Appellants that they were unable to post a bond of any kind, and this representation was made a part of the Order for Injunction. Contrary to the representation of the Appellants, as shown by the attached financial report for the National Trust for Historic Preservation marked Exhibit C, Intervenor-Appellant National Trust for Historic Preservation has assets in excess of $48,000,000.00, and total gross annual income in excess of $22,000,000.00. In 1989, the National Trust for Historic Preservation received federal funding in excess of $4,000,000.00. Furthermore, as Judge Kopf found at pages 30 to 32 of his opinion, a separate Appellant Mercer Management Company has property holdings in the Old Market area and substantial management contracts in the Old Market area. Thus, contrary to their prior representations, Appellants have sufficient assets to post a bond in accordance with Rule 8(b) of the Federal Rules of Appellate Procedure.

5. For ease of reference, ODF sets forth the following authorities as part of this Motion in lieu of a separate memorandum. In *DataPhase Systems, Inc., v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the traditional standards for interim injunctive relief are summarized as follows:

> Whether a preliminary injunction should issue involves a consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

6. With respect to Appellant's probability of success on the merits, the claims of the Plaintiffs and Intervenor have been thoroughly considered by two different judges (Magistrate Kopf and Judge Urbom) who together have made six separate rulings on these claims (Judge Urbom's Memorandum and Order on Motions for Temporary Restraining Order and Preliminary Injunction dated April 13, 1988, Filing No. 26; Magistrate's Findings and Recommendations dated July 28, 1988, Filing No. 261; Magistrate's Findings and Recommendations dated January 20, 1989, Filing No. 468; Judge Urbom's Memorandum and Order dated December 30, 1988, Filing No. 448; Judge Urbom's Memorandum and Order on Plaintiffs' and Intervenor's Objections to the Magistrate's Findings of Law and Fact and their Motion to Reject Part of the Magistrate's Recommendations dated February 14, 1989, Filing No. 485; and, Judge Urbom's Memorandum and Order on Motion for Stay dated February 22, 1989, Filing No. 492). In all of these considerations, both Judges determined that there was no federal involvement in the Riverfront

Redevelopment Project and that there was no merit to the Plaintiffs' and Intervenor's claims. Copies of the foregoing opinions are submitted with this Motion for the convenience of the Court. In view of the prior, detailed rulings against the Plaintiffs and Intervenor, ODF submits Appellants cannot demonstrate a probability of success on the merits.

7. Moreover the continuation of the injunction dated March 1, 1989, has caused and will continue to cause ODF substantial damages as previously described. Accordingly, ODF submits that the injunction should be dissolved. In the alternative, ODF submits that Appellants should be required to post a sufficient surety bond in the amount of $1,000,000.00 in favor of ODF in accordance with Rule 8(b) of the Federal Rules of Appellate Procedure.

WHEREFORE, ODF moves the Court to dissolve the prior injunction entered in these proceedings on March 1, 1989, and to specifically dissolve the injunction relating to the roof covering the alley and parking space between the John Deere Warehouse and the John Day Buildings. In the alternative ODF moves the Court to require the Appellants to post a surety bond in the amount of $1,000,000.00 to cover ODF's damages in accordance with the provisions of Rule 8(b) of the Federal Rules of Appellate Procedure.

OMAHA DEVELOPMENT
FOUNDATION,
a Nebraska non-profit corporation,
Defendant-Appellee,

By: Frank F. Pospishil
Frank F. Pospishil

of Abrahams, Kaslow & Cassman
8712 West Dodge Road, #300
Omaha, NE 68114
Telephone: (402) 391-1250
Its Attorneys

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

Michael C. Wiese, being first duly sworn on oath, deposes and states that (1) he is the Executive Director of Defendant Omaha Development Foundation, a Nebraska non profit corporation, Defendant-Appellee herein; (2) he is personally in charge of the Riverfront Project on behalf of ODF, including the acquisition and demolition of the buildings in Jobbers Canyon; (3) he has read the foregoing motion; (4) he has personal knowledge of the facts set forth therein; and (5) such facts are true.

/s/ Michael C. Wiese
Michael C. Wiese

SUBSCRIBED and sworn to before me this 28th day of March, 1989.

/s/ Jessie Ellen Riggs
Notary Public

My Commission Expires:

GENERAL NOTARY - State of Nebraska
JESSIE ELLEN RIGGS
My Comm. Exp. April 27, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing pleading was served on each of the

attorneys in this litigation by mailing a copy of same, by regular United States mail, postage prepaid, on the 28 day of March, 1989, addressed as follows:

John E. North
Suite 1100
One Central Park Plaza
Omaha, NE 68102

Steven E. Achelpohl
Schumacher & Achelpohl
1823 Harney Street,
Suite 100
Omaha, NE 68102

Elizabeth S. Merritt
Assistant General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue, N.W.
Washington, D.C.20036

Elizabeth Ann Peterson
Attorney at Law
Department of Justice
P.O. Box 23795
(L'Enfant Plaza Station)
Washington, D.C. 20026

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1819 Farnam Street, #804
Omaha, NE 68183

Henry L. Wendt
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Omaha, NE 68183

Edward F. Fogarty
700 Service Life Building
1904 Farnam Street
Omaha, NE 68102

Dorthy M. Tubach
10828 Old Mill Road, #6
Omaha, NE 68154

/s/ Frank F. Pospishil
Frank F. Pospishil

PHOTO OF JOBBERS CANYON LOOKING SOUTH FROM FARNAM STREET TAKEN MARCH 22, 1989

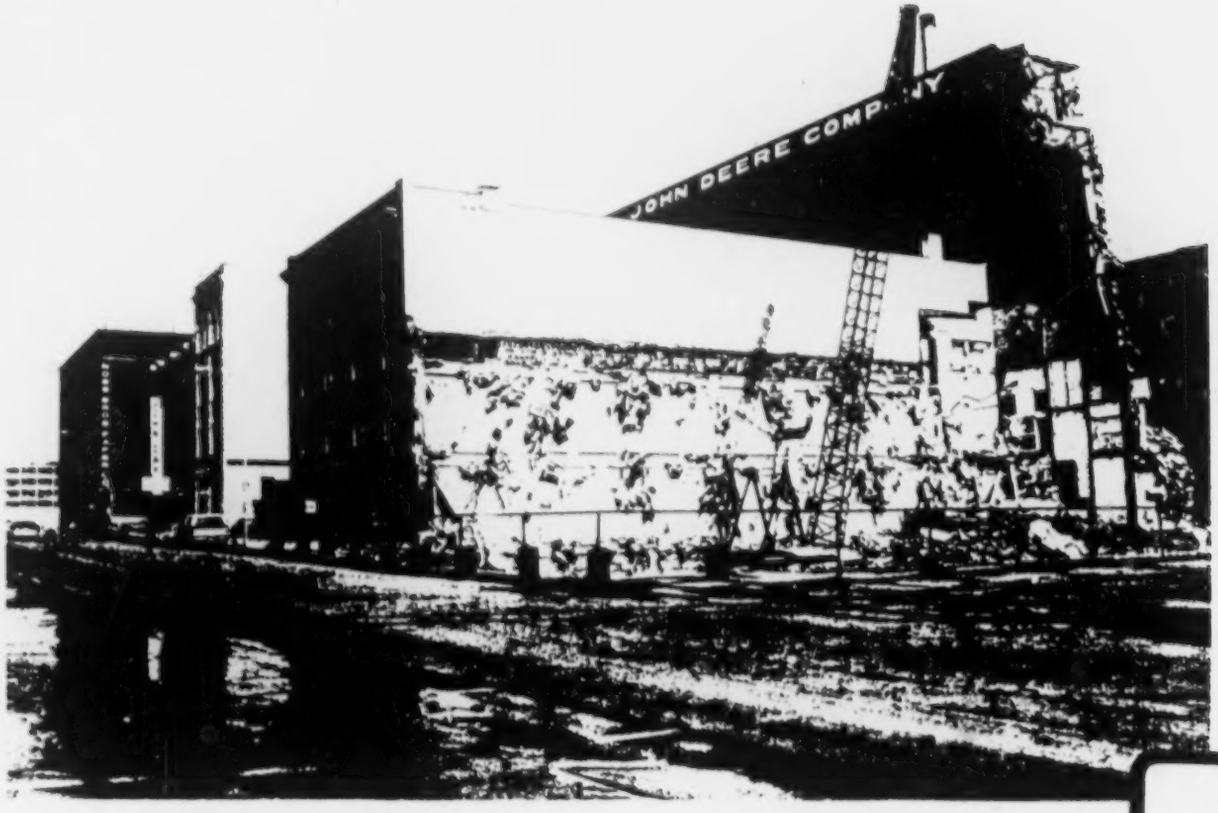

PHOTO OF JOHN DAY BUILDINGS AND ADJOINING JOHN DEERE COMPANY WALL TAKEN ON MARCH 22, 1989

EXHIBIT
A

AERIAL PHOTO TAKEN ON FEBRUARY 20, 1989, FROM THE SOUTHEAST CORNER OF THE PROJECT LOOKING TO THE NORTHWEST

SCALE MODEL OF THE COMPLETED PROJECT LOOKING FROM THE NORTHWEST TO THE SOUTHEAST

EXHIBIT B

JOHN DAY COMPANY

Since 1909

P.O. Box 3541 • Omaha, Nebraska 68103 • Phone (402) 344-4123 • Fax No. 402-344-7243

March 22, 1989

Address Reply to
Omaha

Mr. Michael C. Wiese
Executive Director
Omaha Development Foundation
1301 Harney Street
Omaha, Nebraska 68102

Dear Mike:

In accordance with Section 8.5 of our closed Option Agreement, John Day Company may remain in possession of the property at 401 South 10th Street (Lots 3, 4 & 5, Block 153, Original City of Omaha) until May 1, 1989. However, relocation to our new facility is ahead of this schedule and, in accordance with our agreement, we intend to terminate our occupancy prior to May 1, 1989.

Therefore, please accept this letter as our notice to you that the John Day Company plans to deliver exclusive possession of the property to the Omaha Development Foundation as follows:

A. The south building (Lot 5, Block 153) upon receipt of this notice.

B. The north building (Lots 3 & 4, Block 153) on April 10, 1989.

Please let me know if there is anything we need to do to coordinate utility disconnections. Utilities have been notified on south building.

Sincerely,

JOHN DAY COMPANY

/s/ Jere W. Fonda
Jere W. Fonda
President

JWF:vlr

cc: Tyler Gaines
John Fonda
Matt Fonda

EXHIBIT C

NATIONAL TRUST FOR HISTORIC PRESERVATION
1987 ANNUAL REPORT

National Trust for Historic Preservation: Financial Statements

Balance Sheets

	September 30 1987	1986
Current assets:		
Cash and cash equivalents including donations for specific purposes of $1,327,752 in 1987 and $1,135,525 in 1986	$ 5,158,597	$ 4,670,170
Grants receivable	114,826	41,453
Other accounts receivable	1,708,155	1,291,701
Merchandise inventory	615,372	577,527
Prepaid expenses and other	597,006	452,360
Total current assets	8,193,956	7,033,211
Investments, at market (Notes 1, 4, and 5):		
National Preservation Loan Fund	2,857,588	2,953,353
Inner-City Ventures Fund	2,332,198	1,915,546
Endowments and similar funds	30,032,431	24,400,886
Total investments	35,222,217	29,269,785
Historic properties (Note 2)		
Property and equipment, at cost (Note 6):		
Headquarters, including land of $812,965 in 1987 and 1986	5,930,006	5,725,061
Fixtues, equipment and vehicles	1,535,464	1,015,979
	7,465,470	6,741,040
Less accumulated depreciation	2,658,088	2,217,120
Total property and equipment	4,807,382	4,523,920
Other assets	715,072	950,704
Total assets	$48,938,627	$41,777,620

	September 30 1987	1986
Current liabilities:		
Accounts payable	$ 1,191,524	$ 1,538,097
Accrued expenses	1,089,679	1,310,756
Donations for specific purposes	1,327,752	1,135,525
Current portion of long-term debt (Note 7)	11,500	93,340
Deferred income	1,969,526	1,973,706
Total current liabilities	5,589,981	6,051,424
Long-term debt (Note 7)	1,038,000	549,500
Other liabilities	92,236	112,909
Total liabilities	6,720,217	6,713,833
Fund balances:		
Revolving funds (Notes 4 and 5)	4,084,949	4,180,559
Endowments and similar funds (Notes 1 and 4)		
Endowments	18,832,027	14,937,686
Quasi-endowments	11,200,404	9,463,200
Total endowments and similar funds	30,032,431	24,400,886
Unrestricted		
Net investment in property and equipment (Note 6)	4,807,382	4,523,920
Designated by Trustees	1,555,776	880,524
Cumulative excess of support and revenues over expenses	1,737,872	1,077,898
Total unrestricted	8,101,030	6,482,342
Total fund balances	42,218,410	35,063,787
Commitments (Note 6)		
Total liabilities and fund balances	$48,938,627	$41,777,620

ION

	September 30 1987	1986
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Commitments (Note 6)		
Total liabilities and fund balances	$48,938,627	$41,777,620

Statement of Support, Revenues and Expenses

	Year ended September 30 1987	1986*
Operating support and revenues:		
Grant income	$ 4,913,870	$ 5,203,495
Donations (Note 1)	6,247,073	5,505,886
Membership dues (Note 1)	2,964,323	3,050,799
Admissions and special events	1,912,173	1,628,434
Investment income	1,502,011	1,495,046
Contract services	1,316,403	1,216,206
Sales of articles	1,210,239	1,112,275
Sales of property (Note 2)	916,696	1,047,721
Advertising	724,711	596,841
Rental income, net of related expenses (Note 6)	320,720	364,147
Miscellaneous	717,154	909,996
Total operating support and revenues	22,765,373	22,130,846
Operating expenses (Notes 1 and 2):		
Program services:		
Historic properties	5,459,977	5,678,691
Preservation services	5,419,963	5,350,025
Publications	2,550,813	2,435,080
Education	1,793,429	2,031,383
Total program services	15,224,182	15,495,179
Supporting services:		
Membership development	1,951,698	1,643,348
General and administration	1,785,761	1,679,646
Fund raising	1,734,579	1,709,351
Total supporting services	5,472,038	5,032,345
Total operating expenses	20,696,220	20,527,524
Excess of operating support and revenues over operating expenses	$ 2,069,153	$ 1,603,322

*Reclassified for comparative purposes.

Statements of Changes in Fund Balances

	Revolving funds	*Endowments and similar funds*	*Unrestricted*	*Total*
Balance at September 30, 1985	$4,100,233	$20,476,925	$5,642,952	$30,220,110
Additions (deductions) during the year:				
Excess of support and revenues over expenses			1,603,322	1,603,322
Donations, net	256,050	553,266		809,316
Investment income, net	363,408			363,408
Bowlingly endowment – donated to the Trust		(183,694)		(183,694)
Realized and unrealized gains, net		2,804,912		2,804,912
Expenses	(539,132)	(14,455)		(553,587)
Transfers, net		763,932	(763,932)	
	80,326	3,923,961	839,390	4,843,677
Balance at September 30, 1986	4,180,559	24,400,886	6,482,342	35,063,787
Additions (deductions) during the year:				
Excess of support and revenues over expenses			2,069,153	2,069,153
Donations, net	116,000	122,920		238,920
Investment income, net	281,170			281,170
Realized and unrealized gains, net		5,081,611		5,081,611
Expenses	(492,780)	(23,451)		(516,231)
Transfers, net		450,465	(450,465)	
	(95,610)	5,631,545	1,618,688	7,154,623
Balance at September 30, 1987	$4,084,949	$30,032,431	$8,101,030	$42,218,410

Statements of Changes in Financial Position

	Year ended September 30 1987	1986
Sources of working capital:		
Excess of support and revenues over expenses	$2,069,153	$1,603,322
Add depreciation not affecting working capital	440,968	386,342
Working capital provided by operations	2,510,121	1,989,664
Decrease in other assets	235,632	
Increase in long-term debt and other liabilities	467,827	403,447
Increase in revoling funds and endowments and similar funds, net	5,085,470	3,240,355
Total sources	8,299,050	5,633,466
Uses of working capital:		
Increase in investments	5,952,432	4,337,623
Property and equipment additions, net	724,430	200,587
Increase in other assets		486,753
Total uses	6,676,862	5,024,963
Increase in working capital	$1,622,188	$ 608,503
Changes in components of working capital:		
Increase (decrease) in working capital:		
Cash and cash equivalents	$ 488,427	$1,651,133
Grants receivable	73,373	(5,568)
Other accounts receivable	416,454	120,538
Merchandise inventory	37,845	32,385
Prepaid expenses and other	144,646	(5,798)
Accounts payable	346,573	(258,109)
Accrued expenses	221,077	(718,813)
Donations for specific purposes	(192,227)	971
Current portion of long-term debt	81,840	81,828
Deferred income	4,180	(290,064)
Increase in working capital	$1,622,188	$ 608,503

Statement of Functional Expenses for the Year Ended September 30, 1987 with Comparative Totals for 1986

	Program Services				
	Historic properties	*Preservation services*	*Publications*	*Education*	*T pro se*
Employee costs:					
Salaries	$2,014,779	$2,326,341	$ 540,480	$ 611,302	$ 3
Payroll taxes and benefits	339,463	505,923	98,369	120,525	
	2,354,242	2,832,264	638,849	731,827	
Professional services	241,912	560,097	123,655	124,258	
Travel and representation	88,966	491,480	43,752	137,933	
Office supplies and expenses	83,443	133,432	50,491	42,666	
Printing and related expenses	166,111	251,450	962,029	145,376	
Postage and mailing	40,647	113,314	440,957	51,922	
Telephone and telegraph	103,603	131,512	42,730	35,261	
Reference materials	15,754	15,122	11,940	8,057	
Occupancy	315,571	429,553	74,317	98,958	
Maintenance	470,272			57,052	
Real estate management	485,603				
Grants and awards	12,234	360,262		5,500	
Cost of merchandise sold	243,942		25,251	209,458	
Property development	464,511				
Insurance	173,208	8,224		3,704	
Miscellaneous	199,958	93,253	136,842	141,457	
	3,105,735	2,587,699	1,911,964	1,061,602	
	$5,459,977	$5,419,963	$2,550,813	$1,793,429	$1

tal ram ices	Supporting Services				Total Expenses	
	Membership development	General and administration	Fund raising	Total supporting services	1987	1986
492,902	$ 374,538	$ 946,166	$ 615,620	$1,936,324	$ 7,429,226	$ 7,289,15
064,280	76,182	200,531	124,911	401,624	1,465,904	1,125,00
557,182	450,720	1,146,697	740,531	2,337,948	8,895,130	8,414,16
049,922	125,942	186,278	498,649	810,869	1,860,791	1,901,32
762,131	21,936	98,771	96,838	217,545	979,676	958,97
310,032	51,634	116,440	28,306	196,380	506,412	409,88
524,966	574,559	13,619	127,930	716,108	2,241,074	2,185,04
646,840	578,954	24,543	43,231	646,728	1,293,568	1,243,97
313,106	34,389	55,756	38,855	129,000	442,106	473,10
50,871	3,205	10,398	6,990	20,593	71,466	74,14
918,399	81,805	126,048	86,443	294,296	1,212,695	1,128,73
527,324					527,324	288,18
485,603					485,603	410,04
377,996					377,996	454,58
478,651					478,651	433,48
464,511					464,511	1,376,25
185,136					185,136	133,75
571,510	28,554	7,211	66,806	102,571	674,081	641,86
667,000	1,500,978	639,064	994,048	3,134,090	11,801,090	12,113,36
224,182	$1,951,698	$1,785,761	$1,734,579	$5,472,038	$20,696,220	$20,527,52

Notes to Financial Statements

September 30, 1987 and 1986

Note 1 – Summary of Significant Accounting Policies

Fund Accounting

The National Trust for Historic Preservation in the United States (the Trust) is a private, nonprofit organization chartered by Congress with the responsibility to facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture. The accounts of the Trust are maintained in accordance with the principles of fund accounting. Under fund accounting resources for various purposes are classified for accounting and reporting purposes into funds established according to their nature and purpose.

Accounting for Historic Properties

The Trust owns certain historic properties which are operated as museums or are otherwise important to the Trust in carrying out is preservation programs. Certain other properties may be held with the intent of sale. By disposing of these types of properties, the Trust has decided that the particular asset may be more productively employed in other forms of investments which will generate additional support for the programs of the Trust. Historic properties have been acquired by the Trust through gift, bequest, purchase and other means. In addition, the Trust has remainder interests in several other properties.

The Trust follows the accounting practice of not including in its assets the cost or appraised value of any of its

historic properties which upon receipt may be retained by the Trust. Related expenditures for restoration, stabilization, reconstruction and development are charged to expense as incurred. Properties accepted with the intent of sale are recognized as income at the time of sale. The following historic properties, including objects and furnishings, are owned by the Trust and are not recorded in the accounts under the accounting policy stated above:

Historic House Museums

Belle Grove, Middletown, Virginia*
Chesterwood, Stockbridge, Massachusetts
Cliveden, Philadelphia, Pennsylvania*
Cooper-Molera Adobe, Monterey, California*
Decatur House, Washington, D.C.
Drayton Hall, Charleston, South Carolina
Filoli, Woodside, California*
Frank Lloyd Wright Home and Studio, Oak Park, Illinois*
Lyndhurst, Tarrytown, New York
Montpelier, Montpelier Station, Virginia
Oatlands, Leesburg, Virginia*
Pope-Leighey House, Mount Vernon, Virginia
Shadows-on-the-Teche, New Iberia, Louisiana
Woodlawn Plantation, Mount Vernon, Virginia
Woodrow Wilson House, Washington, D.C.

Non-Museum Properties

Aiken House, Charleston, South Carolina
Brucemore, Cedar Rapids, Iowa*
Casa Amesti, Monterey, California*
Reynolds Tavern, Annapolis, Maryland*

The above properties are important to the Trust in carrying out its preservation programs and the Trust intends to retain them so long as economically feasible. Those which are museums are operated for public benefit and to the highest recognized professional standards. Several of the historic properties listed above are managed for the Trust by local nonprofit preservation organizations, government entities, or other groups under various cooperative arrangements as indicated by an asterisk above.

Merchandise Inventory

Inventory is stated at the lower of cost or market, cost being determined on the first-in, first-out basis.

Investments

Investments are carried at market value, which is considered to equal cost of quoted market prices are not available. Income is recognized from interest and dividends as earned. The Trust maintains master investment accounts for its endowment and quasi-endowment funds. Realized and unrealized gains and losses from securities in the master investment accounts are allocated monthly to the individual endowments based on the relationship of the market value for each endowment or quasi-endowment to the total market value of the master investment accounts, as adjusted for additions to or deductions from these accounts.

Endowment and Similar Funds

The Trust has certain endowments and quasi-endowments that have been donated over the years to provide income for general operating purposes of the Trust and for preservation and maintenance of designated historic properties. Endowment funds are those in which the donor has stipulated that the principal is to be maintained in perpetuity and only the income from the investments of the fund may be expended. Quasi-endowments are those funds which operate as endowments, but the Board of Trustees has the right to decide at any time to expend the principal of such funds. In 1987 and 1986, the Board of Trustees transferred $450,465 and $763,932, respectively, of income from unrestricted equity to quasi-endowment.

Grant Income

Amounts received from grants (principally U.S. Government) and donations received for specific purposes are recognized as income to the extent of related expenses incurred for grant and donation purposes.

Membership Dues and Donations

Income from membership dues is recognized over the period to which the dues relate. The Trust receives advance payments for memberships which are principally for a period of one year. These advance payments are deferred and recognized ratably as membership revenue over the related contract term. Beginning in fiscal year 1987, the Trust changed its method of accounting for

donations which are received together with membership dues to recognize such payments as donation income upon receipt.

Previously, these donations were deferred and amortized in the same proportion as the related membership dues and recorded as membership income. This change in accounting for donations which are received together with membership dues was applied prospectively as required by Accounting Principles Board Opinion No. 20. "Accounting Changes" and had the effect of increasing total revenue in fiscal year 1987 by approximately $474,000. The total reclassification from membership income to donation income was approximately $893,000.

Depreciation

Depreciation of fixtures, equipment and vehicles is computed on the straight-line basis over useful lives of five to ten years. The headquarters building is being depreciated over thirty years on the straight-line basis.

Functional Allocation of Expenses

The costs of providing various programs and other activities have been summarized on a functional basis in the statements of support, revenues and expenses and in the statements of functional expenses. Accordingly, certain costs have been allocated among the programs and supporting services benefited.

Income Tax Status

The Trust is a 501(c)(3) organization exempt from income tax as provided under section 501(a) of the Internal

Revenue Code. Income from certain Trust activities not directly related to its tax-exempt purpose is subject to income tax. At September 30, 1987, the Trust had unused operating loss carry forwards relating to these activities of approximately $252,000 which may be applied against future taxable income expiring in various years from 1993 to 2001.

Note 2 – Property Transactions

As discussed in Note 1, the Trust acquires certain historic properties through gift, bequest, purchase and other means. The following summarizes the significant transactions affecting historic properties owned by the Trust for the fiscal years 1987 and 1986:

Pocantico Hills

In January 1979, the Trust was bequeathed a one-quarter undivided interest owned by Nelson A. Rockefeller in the 250-acre Rockefeller family estate in Pocantico Hills, New York (a National Historic Landmark). Effective December 7, 1983, the Trust became the sole owner of an 86-acre parcel within the estate in exchange for its undivided one-quarter interest. The Trust's parcel includes the Rockefeller family home, Kykuit and several other significant structures. On the same date, the Trust's parcel was leased to David and Laurance S. Rockefeller for their private use under an agreement by which they, in addition to rents, will continue to pay all maintenance and capital expenses of the property and all other expenses of its operation during the term of the lease. Subject to

certain conditions, as defined, the lease term expires January 31, 1988. No amounts have been recorded in the financial statements for this bequest or for expenses related to this property which were paid in behalf of the Trust by the Rockefellers.

In October 1986, the Trust submitted to the Rockefellers a plan for the future operation of the Trust's parcel for limited public visitation and other charitable and private purposes. Under this plan, restoration and maintenance of the property and certain other expenses would be paid by the Rockefellers through an endowment fund and other sources. In May 1987, the Rockefellers made a counterproposal in which the Trust would deed its 53-acre parcel to Rockefeller University, subject to a preservation easement requiring the University to maintain the parcel's historic qualities and permit public visitation at a future time. The Rockefeller family would provide the Trust with an unrestricted grant and would purchase the non-historic portion of the parcel, approximately 33 acres, for an amount to be negotiated. The counterproposal is currently under consideration by the Trust. If an agreement is not reached, the Rockefellers are required to purchase the life interest in the Trust's Pocantico parcel and have an option to purchase the Trust's remainder interest at its fair market value, under the terms of a 1983 agreement between the parties.

Montpelier

In October 1984, the Trust acquired Montpelier, a 2,677-acre estate in Orange County, Virginia, the home of James Madison. Mrs. Marion dePont Scott made a $10 million

bequest to the Trust for the purpose of acquiring and operating Montpelier as an historic shrine. Upon receipt of the $10 million bequest, the Trust acquired the estate through payment of $7.7 million to Mrs. Scott's five nieces and nephews who jointly owned the property following her death. The endowment for the property, after payment to the duPont heirs and expenses related to certain litigation over Mrs. Scott's bequest, is not sufficient to maintain it in perpetuity. In March 1987, the Trust opened Montpelier to public visitation. In addition to admission fees and donations. Montpelier received income from timber sales, rentals, interest and special events. The Trust is seeking additional funding for the Montpelier property and has formed a foundation for that purpose.

Sale of Property

During fiscal year 1987, three properties which had been held for sale were sold for $394,789. An additional $531,907 was received from the sale of the contents of a house and from the sale of rare collectibles. The net proceeds from the properties, the contents of the house and the collectibles were recorded as unrestricted income, net of related expenses, for a total of $926,696. These property transactions are listed below:

In fiscal year 1986, the Trust received a house and property in Georgetown, Washington, D.C. In January 1987, the property was sold with net proceeds to the Trust of $206,108.

In fiscal year 1985, the Trust received a house and property in Westbrook, Connecticut. In May 1987, the property

was sold with restrictive covenants for the net proceeds of $163,798.

In fiscal year 1987, a property contiguous to the Bowlingly estate in Queenstown, Maryland, called "Kenworthy Sliver," was donated to the Trust. Its sale provided net proceeds to the Trust of $24,883.

In March 1987, the Trust received $275,000 from the sale of a rare collectible which had been purchased by the Decatur House Council in 1969. The proceeds were used to establish a new Collections Fund for the Decatur House in the amount of $125,000 and to repay the borrowing from the Decatur House endowment used to fund the construction of the Decatur Carriage House.

In 1982, the Trust was given a remainder interest in a Charles Town, West Virginia residence in which the donor retained a life estate. In the donor's will the Trust was also named as the recipient of the property's contents. In January 1987, the donor died and the tangible personal property from the house was sold for $256,907, net of related expenses. A contract for the sale of the house and property was entered into with restrictive covenants for $283,000. It is anticipated that this sale will be finalized in fiscal year 1988.

Note 3 – Description of Program and Supporting Services

Description of the program and supporting services in the accompanying financial statements is as follows:

Publications

Fosters knowledge, stimulates interest and facilitates participation in public and private historic preservation through the printing and publication of the Trust's general materials, newspaper, and magazine and the administration of the book publishing program.

Education

Encourages an understanding of all aspects of preservation and the development of related skills through such programs as providing essential restoration trade skills, identifying and nurturing target audiences (including the media) for communication, merchandising, preservation-related products and offering legal information for the protection of historic districts and landmarks.

Included in education expenses are donated public service announcements which totaled $3,760 and $42,449 in 1987 and 1986, respectively. A corresponding amount is also recognized as revenue.

Historic Properties

Preserves and manages for public benefit the Trust's property, real and personal, and administers the programs for the preservation of endangered and other historic properties nationwide.

Preservation Services

Provides (1) information and technical assistance to the Trust's members, private and public organizations and

governmental bodies with respect to contemporary preservation issues, including maritime preservation, (2) financial assistance to member organizations to facilitate preservation education programs, conferences, and the retention of professional consultants, and (3) the oversight and administration of six regional offices to act as the Trust's primary local liaison for onsite visits, consultation and advisory assistance.

Membership Development

Encompasses the identification, cultivation and expansion of the Trust's membership as the primary effort to promote preservation awareness and to increase public involvement in preservation activities.

General and Administration

Includes the functions necessary to maintain an equitable employment program, assure an adequate working environment, provide coordination and articulation of the Trust's program strategy through the Office of the President; secure proper administrative functioning of the Board of Trustees and Board of Advisors, and manage the financial and budgetary responsibilities of the Trust, provide legal advice to the Board of Trustees and the management of the Trust and corporate legal services to the Trust's programs and offices, maintain a litigation program on nationally significant preservation issues, and provide legislative services, policy research and educational programs through the Center for Preservation Policy Studies.

Fund Raising

Provides the structure necessary to encourage and secure private financial support from individuals, foundations and corporations.

Insert Note 4 – Investments chart

Note 4 – Investments

The composition of investments owned by the Trust at September 30, 1987 and 1986 are presented below.

September 30, 1987	*National Preservation Loan Fund*	*Inner-City Ventures Funds*	*Endowments and Similar Funds*	*Total*
Cash and cash equivalents	$2,060,961	$2,061,315	$ 2,138,331	$ 6,260,607
Notes receivable	796,627	270,883	194,335	1,261,845
Master investment account			27,699,765	27,699,765
	$2,857,588	$2,332,198	$30,032,431	$35,222,217
September 30, 1986				
Cash and cash equivalents	$2,343,069	$1,632,427	$ 2,168,893	$ 6,144,389
Notes receivable	610,284	283,119	455,882	1,349,285
Master investment account			21,776,111	21,776,111
	$2,953,353	$1,915,546	$24,400,886	$29,269,785

As of September 30, 1987, grant and loan commitments for the National Preservation Loan Fund and Inner-City Ventures Fund were $948,000 and $1,553,000, respectively.

The cost of total investments was approximately $31,662,059 and $27,811,665 at September 30, 1987 and 1986, respectively. The unrealized and realized components of the gains related to investments are presented below:

	September 30	
	1987	*1986*
Unrealized net gain	$1,985,592	$ 561,188
Realized net gain	3,096,019	2,243,724
Total realized and unrealized net gain	$5,081,611	$2,804,912

As a result of the decline in the stock market which occurred in October 1987, the market value of the investments owned by the Trust decreased by approximately $4,980,000.

Note 5 – Revolving Loan Funds

The revolving loan funds of the Trust were established to provide assistance in the preservation of historic properties. This assistance is provided primarily through low-interest loans to various preservation organizations and individuals; however, grants are also made for projects with no provision for repayment to the Trust. Such grant activity is reflected as income and expense in the Statement of Support, Revenue and Expenses. Organizations repay Trust loans from sales, rentals, interest income and fund raising.

National Preservation Loan Fund

The National Preservation Loan Fund (NPLF) provides low-interest loans, loan guarantees, interest subsidies, and in special circumstances, grants, and technical assistance to help organizations with the creation or expansion of preservation revolving funds and with preservation development projects for historic buildings, sites and districts. A special endangered properties component of the NPLF provides financial assistance to help preserve endangered National Historic Landmarks.

NPLF assistance can be used for acquisition, rehabilitation and related capital costs for projects involving historic properties. NPLF money must be matched with local capital.

The maximum loan is $100,000 and the term is no more than five years. Interest rates range from 5% to 8%. Certain loans are unsecured. Grants made out of the NPLF totaled $15,000 and $63,425 in 1987 and 1986, respectively.

Inner-City Ventures Fund

The Inner-City Ventures Fund (ICVF) provides a vehicle for revitalizing inner – city historic areas without displacing people. The ICVF provides low-interest loans and development expertise to neighborhood nonprofit incorporated 501(c)(3) organizations to rehabilitate buildings for housing, jobs and services for current, lower income, primarily minority residents.

ICVF assistance can be used for acquisition, rehabilitation and related capital costs for historic properties. ICVF grants range from $20,000 to $50,000. Generally, each is coupled with a low-interest loan of an equal amount. ICVF loans are made for five years or less with an interest rate ranging from 5% to 8.25%. Grants made out of ICVF totaled $54,736 and $42,489 in 1987 and 1986, respectively.

Note 6 – Property and Equipment

The Trust maintains its headquarters at 1785 Massachusetts Avenue, Washington, D.C. Approximately 22,500 and 20,500 square feet of the headquarters building's 60,500 square feet which were not occupied by the Trust during 1987 and 1986, respectively, were leased to unrelated parties for terms not exceeding five years.

The expenses of the headquarters building are allocated to the various program and supporting services of the Trust and to the leased space based on square footage. Rental income received from tenants occupying space in the headquarters building was $526,588 in 1987 and $460,818 in 1986. Related expenses, including depreciation, allocated to the leased space totaled $404,327 and

$312,388 in 1987 and 1986, respectively. Additionally, the Trust received rental income from other properties totalling $182,929 and $170,150 for 1987 and 1986, respectively. Minimum future rental income from noncancellable operating leases as of September 30, 1987 is as follows:

Year ended September 30	
1988	$ 565,557
1989	382,104
1990	130,392
1991	21,600
Later years	46,800
	$1,146,453

The Trust rents certain office space (principally for regional offices) and equipment under operating leases. Total rental expense under such leases was approximately $213,477 in 1987 and $214,000 in 1986. Minimum lease commitments on property and equipment as of September 30, 1987 are as follows:

Year ended September 30	
1988	$ 151,147
1989	143,023
1990	102,063
1991 and later years	26,232
	$ 422,465

Note 7 – Long-Term Debt

Long-term debt consists of the following:

	September 30	
	1987	*1986*
Note to the Ford Foundation payable in quarterly installments beginning in 1984 of $41,666, interest at 5%, partially secured by ICVF notes receivable		$ 83,340
Note to the Ford Foundation payable in two equal installments in May 1996 and September 1997, interest at 3%, partially secured by ICVF notes receivable	$1,000,000	500,000
Note to the James A. MacDonald Foundation payable in seven annual installments beginning December 1, 1984 through December 1, 1990 without interest	49,500	59,500
	1,049,500	642,840
Less current portion of long-term debt	[11,500]	[93,340]
	$1,038,000	$549,500

Total interest expense was $16,653 and $9,375 in 1987 and 1986, respectively.

Note 8 – Retirement Plan

The Trust terminated its non-contributory defined benefit retirement plan effective December 31, 1985 and adopted a non-contributory defined contribution plan effective January 1, 1986. The new non-contributory defined contribution plan provides benefits to all eligible employees of the Trust. Contributions are currently determined based on five percent of the eligible employees' compensation for the calendar year. Amounts charged to pension expense were $352,187 and $150,000 in fiscal years 1987 and 1986, respectively. Assets of the terminated Plan exceeded the amount necessary to satisfy all liabilities. The Board of Trustees adopted a resolution providing that one-half of the residual assets be used to provide additional benefits to participants and beneficiaries. The residual assets in excess of the assets used to provide such additional benefits, net of any administrative fees and expenses and any remaining plan liabilities, will revert to the Trust. On December 7, 1987, the remaining liabilities of the Plan were settled and the Trust received residual assets totalling approximately $834,000. Additionally, the Plan termination was approved by the Internal Revenue Service and the Pension Benefit Guarantee Corporation.

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The National Trust for Historic Preservation is the only national private, nonprofit organization chartered by Congress with the responsibility for encouraging public

participation in the preservation of sites, buildings and objects significant in American history and culture. Support for the National Trust is provided by membership dues, endowment funds, contributions and matching grants from federal agencies, including the U.S. Department of the Interior, National Park Service, under provisions of the National Historic Preservation Act of 1966. The opinions expressed in this publication are not necessarily those of the U.S. Department of the Interior.

The National Trust is an equal opportunity organization and seeks to include qualified individuals and businesses in all phases of its activity. The National Trust does not discriminate on the basis of race, color, religion, age, sex, national origin, handicap or veteran status. The Trust seeks opportunities to include these groups in its programs and activities.

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(Back Cover: Maguire/Reeder, Ltd.)

December 7, 1987
To the Board of Trustees

National Trust for Historic Preservation in the United States

In our opinion, the accompanying balance sheets and the related statements of support, revenues and expenses, of changes in fund balances, of changes in financial position and of functional expenses present fairly the financial position of the National Trust for historic Preservation in the United States at September 30, 1987 and 1986, and the results of its operations and the changes in its financial position for each of the two years in the period ended September 30, 1987, and its functional expenses for the year ended September 30, 1987, in conformity with generally accepted accounting principles consistently applied during the period except for the change, with which we concur, in the method of accounting for donations received together with membership dues as described in Note 1 to the financial statements. Our examinations of these statements were made in accordance with generally

accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

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Supreme Court, U.S.
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MAY 18 1990
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CLERK

No. 89-1530

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

vs.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Defendants.

REPLY TO NON-FEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ARGUMENT

I. NON FEDERAL APPELLEES' ARGUMENT IGNORES THE POLICY REASON WHY THIS PETITION SHOULD BE GRANTED.

The pernicious prong of the Eighth Circuit's *Ringsred* test for triggering NEPA or NHPA is "whether the overall federal involvement with the project is sufficient to turn an essentially private action into federal action." *Rinsgred v. City of Duluth*, 828 F2d 1305, 1308 (8th Cir. 1987). Same rule at *N.A.A.C.P. v. Medical Center Inc.*, 584 F2d 618 (3d Cir. 1978). This effectively encourages the federal regulator to apply NEPA and NHPA in "non federal projects" only where the federal presence is so overwhelming that the project isn't really "non federal" at all.

Granting *certiorari* turns on whether this Court feels this is the time and the case to address the issue. Nevertheless, the non-federal Appellees did not discuss the matter. Instead, a straw man was set up and knocked down: the Courts below made *factual* findings of no ICC, Corps, or NPS approval jurisdiction over the "Jobbers Canyon Project."

The straw man's first defect is obvious and merely semantical. There is no "Jobbers Canyon Project," rather, a Riverfront project that calls for rerouting sewers, changing rail traffic, changing park plans paid for in part by federal funds, building a park and some buildings and streets, and knocking other buildings (Jobbers Canyon) down. A proper framing of the question to obviate the first defect of the straw man would be of this sort: Assuming *arguendo* ICC, Corps, or NPS approval jurisdiction, does a proper Environmental Impact Statement (EIS)

or 106 Review include discussion of Jobbers Canyon fate, alternatives, and mitigation measures? This reaches the second issue in the Petition: Are impacts off site considered, which is really no issue at all. No court anywhere has taken Judge Kopf's extreme position (Pet.App. 68-71) that NEPA and NHPA consider only on site impacts, in this case *on* the rails, *in* the park, or *over* the sewers.

We turn to the second defect of the straw man and that will take up the rest of this Reply. Appellees suggest no federal jurisdiction was found below on the basis of contested facts resolved against the Petitioner, and this Court doesn't reweigh contested facts. We do not ask this Court to re-examine disputed facts. Our position is that upon facts not in dispute, the ICC, the Corps, and NPS has approved jurisdiction as a matter of law. This paves the way to the significant inquiry sought by Petitioner whether or not NEPA and NHPA is restricted to essentially federal projects, the unavoidable terminus of following the third prong of *Ringsred*.

II. THIS COURT IS NOT REQUIRED TO REVIEW DISPUTED FACTS TO ESTABLISH ICC, CORPS, AND NPS APPROVAL JURISDICTION, ONLY NOTE THE LEGAL CONCLUSIONS THAT FOLLOW FROM FACTS NOT IN DISPUTE ON THE RECORD.

The courts below simply refused to address petitioner's contention that legal approval jurisdiction followed necessarily from facts *certain* and *undisputed by any party*.

Those facts, briefly, are as follows. *ICC:* The Union Pacific Railroad traffic rerouted to Burlington Northern

lines historically was and is one train a day, usually seven days a week (occasionally only three) carrying 20 to 40 cars a day from Union Pacific's Council Bluffs, Iowa yards to customers in North Omaha. Shipments out of North Omaha made up the return train to Council Bluffs for further routing across the country. (A rough drawing of the rerouting required by the Riverfront Redevelopment Project follows this brief.) *CORPS:* As to the Corps of Engineers' interest, it is undisputed the floodwall, pressurized sewers spread over the lower downtown area, and pumps constituted the protective works providing flood protection to downtown Omaha including the Redevelopment area. The wall alone would protect against high river events, but the pumps and pressure sewers operated to keep storms, rapid thaw and other city side high water events from flooding the downtown side of the wall by backing up a reservoir. It is uncontested the City got a private consultant, Schimmer and Associates, to devise the sewer and pump changes required by the Redevelopment (Ex. 341) and that the City *did not* submit these plans to the Corps. *NPS:* As to the park, NPS funds partially paid for land acquisition and a set of 1983 plans that designed public access all around the shore of the lake and accommodated several public street approaches to the lake and park from the south and the west. The Riverfront ConAgra campus changed that, cutting off all south public access, all west public access but one small area, and took the entire west and south shore line onto ConAgra property, depriving the public the right to stroll around the lake. On the above conceded and uncontested facts, ICC, Corps, and NPS had approval jurisdiction as a matter of law.

A. Interstate Commerce Commission.

The ICC has jurisdiction over and must approve all joint use agreements (Burlington Northern's lease of lines to Union Pacific to reroute traffic), 49 U.S.C. § 11343(a)(6), and abandonments (Side Hill Lead), *id.* § 10903(a), unless the tracks involved are exempt as "spur, industrial, team, switching, or side tracks," *id.* 10907(a). On the other hand, if the tracks can properly be characterized as "railroad lines" other than spurs and the like, joint use agreements and abandonments *must* be approved by the ICC. Whether a track is a "railroad line" or a "spur, industrial, team, switching, or side track" depends on the function of the track. See *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967):

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad or extension thereof" and there can be no abandonment of such trackage without obtaining a certificate of public conveyance from the [ICC]. If, however, the trackage is used in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side tracks."

In determining whether a track is exempt the analysis consists only of determining its purpose. If the track is used for the actual haul of shipper to receiver, it is not exempt. If it's a side storage track, a yard track where trains are made up, a customers' own "in house" track, it is exempt. See *Illinois Commerce Commission v. United States*, 779 F2d 1270 (7th Cir. 1985). (A stub of track *.1 mile*

long to *one* rail customer receiving only *two cars a year* was right at the cusp of exemption, but not necessarily so.)

The fact that service will be the same as before is, of course, no basis for ICC exemption for the abandonment and joint use approval. Contrary to Judge Kopf's reasoning (Petitioner's Appendix, p. 26), railroads and magistrates don't make the determination how service will be affected or there is no need for an ICC. *Sacramento Northern Railway Trackage Rights*, 290 ICC 145; *Texas v. No.R. Co. Abandonment*, 275 ICC 808; *Sacramento R.Ry. Abandonment*, 282 ICC 804.

The Side Hill Lead formed part of the shipper to receiver actual transportation haul as did the Burlington Northern lines accommodating the haul after Side Hill was abandoned. The rails carried steady traffic. *Those are facts not in dispute.* This Court need only note that failure to find ICC jurisdiction over the abandonment and joint use was simply, clearly, and egregiously wrong.

B. Corp of Engineers.

The Omaha floodwall was built by the Army Corps pursuant to the Flood Control Act of December 22, 1944, specifically authorizing the funding of the Omaha project. That authorization incorporated the requirements of Section 3 of the Flood Control Act of 1936, which dictates the obligations of the local sponsor:

> (c) *maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.* 33 U.S.C. § 701c (emphasis added).

The regulations applicable to floodwall control, which are binding on the City of Omaha, are found at 33 C.F.R. § 208.10(5):

> *No improvement shall be passed over, under, or through the walls, levees, improved channels or floodways, nor shall any excavation or construction be permitted within the limits of the project right-of-way, nor shall any change be made in any feature of the works without prior determination* by the District Engineer of the [Army Corps of Engineers] . . . that such improvement or *alteration* will not adversely affect the functioning of the protective facilities . . . Advice regarding the effect of proposed improvements or alterations on the functioning of the project and information concerning methods of construction acceptable under standard engineering practice shall be obtained from the District Engineer or, *if otherwise obtained, shall be submitted for his approval* . . . (emphasis added.)

The Magistrate and the District Court acknowledged changes in the sewers required approval (Petitioners App, 28, 29, 85), but characterized the approval power over the City in the words of a Corps witness as "gentle persuasion" (Petitioner's App, 85). Elsewhere the same witness likened the Corps power over the City's private engineering plans for Schimmer & Associates to a "teacher," like "a little bird in the ear"* (Tr.985).

Such characterization of Corps' approval power over changes to the elaborate flood control system it built for

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*The court reporter heard a meaningless "low burden year" but this writer, about twelve feet from the witness, clearly heard "little bird in the ear." Would that IRS auditors were so timid!

Omaha was adopted by the Courts below but remains palpable nonsense. Agencies managing federal interests under statute and regulations have real power to enforce their regulations. The Schimmer and Associates sewer plans were required to be submitted to the District Engineer for his approval. The City's defiant refusal could have been corrected by suing the City in district court. "The United States must be empowered to sue for alleged violations of Section 701c [33 U.S.C. 701c] and the regulations because these provisions envision ongoing federal oversight." *United States v. City of Irving*, 482 F.Supp. 393, 395 (ND Tex. 1979), involving the statute and regulations at issue here.

C. National Park Service.

Under the doctrine of *Friends of the Shawangunks v. Clark*, 754 F2d 446, 451-52 (2nd Cir. 1985), the Secretary of the Interior retains approval power over substantial changes even after the federal money is spent as is the case here:

> Any future change that contravenes [the original] plans retroactively calls into question the basis for the original federal funding [under the Land and Water Conservation Fund]. Such a change necessarily requires the Secretary [of the Interior]'s approval, whether or not the change falls with the act's definition of a conversion.

Both *Shawangunks* and this case involve funds managed by the NPS under the Land and Water Conservation Fund Act, 16 U.S.C 460*l*-8(f)(3). At first blush one might think the *Shawangunks'* change vastly more extreme than here (back packers wilderness being encroached upon by golf resort v. city folks being denied a walk all around the

lake and most of their street access), but not really. A downtown park has very special requirements and this Court could conclude approval jurisdiction existed over the changes required by the Riverfront redevelopers. The NPS issue is not as clear cut as the ICC matter where logic will not permit the Court to deny the approval jurisdiction that springs from the admitted purpose and use of the tracks. Nor is the NPS issue as clear cut as the Corps matter where an acknowledged violation of a federal regulation must be more than mere bad manners by the City but rather a court correctable wrong. Nevertheless, what we call on this Court for on the NPS issue is not a re-examination of contested facts but a simple conclusion as to the reach of *Shawangunks* over non contested facts.

CONCLUSIONS

1. Conflict.

The Appellees cry out for this Court to test the third prong of *Ringsred*, when they justapose *Ringsred* with *Sierra v. Hodel*, 848 F2d 1068 (10th Cir. 1988) in an effort to show no conflict in the Circuits. The former, as applied to the Riverfront Redevelopment, is a double safetied gun locked in a drawer and the latter a hair trigger for NEPA and NHPA.

2. Important Case That Is Far Reaching.

This is an important case. A small urban tract set up for non federal development depends on the cooperation

of three federal agencies to take routine approval acts that will allow the development to proceed. In so doing, the agencies have the power *only* to make the participants *discuss* the damage to a historic district and *discuss* mitigation. The Congress has seen fit to deny substantive protection to historic properties and has imposed only the procedural benefits of asking developers to slow down enough to formally discuss things in a 106 review. ConAgra and the other developers behaved typically here, and as it happens all over the country, painting pictures of a project doomed if bureaucrats meddled. The third prong of *Ringsred* encourages the regulator to sit back and not do his duty, a comfortable option in the face of the political heat the developers routinely apply.

Better a hair trigger for NHPA and NEPA. Had one been in place here, political pettifoggery would be cut through, regulators would routinely do their NEPA and 106 reviews and in reasonable time Jobbers Canyon would have gotten due process. Given the power of the economic revitialization lobby, all or most of Jobbers Canyon would have probably been lost anyway, but mitigation as suggested in the Petition would then and now been possible. Judicial time and litigants' money would have been saved in huge portions if the developers had merely obeyed the law.

If this Court adopts a *Hodel*-like trigger, judicial time and litigant expense will be saved hereafter and all over the country. The routine and inevitable administration of procedural protection for historic treasures Congress ordered will be and should be an unremarkable fact of life.

The unseemly steamrolling by developers of officials into ignoring the law will be less frequent with a *Hodel*-like trigger.

Respectfully submitted,

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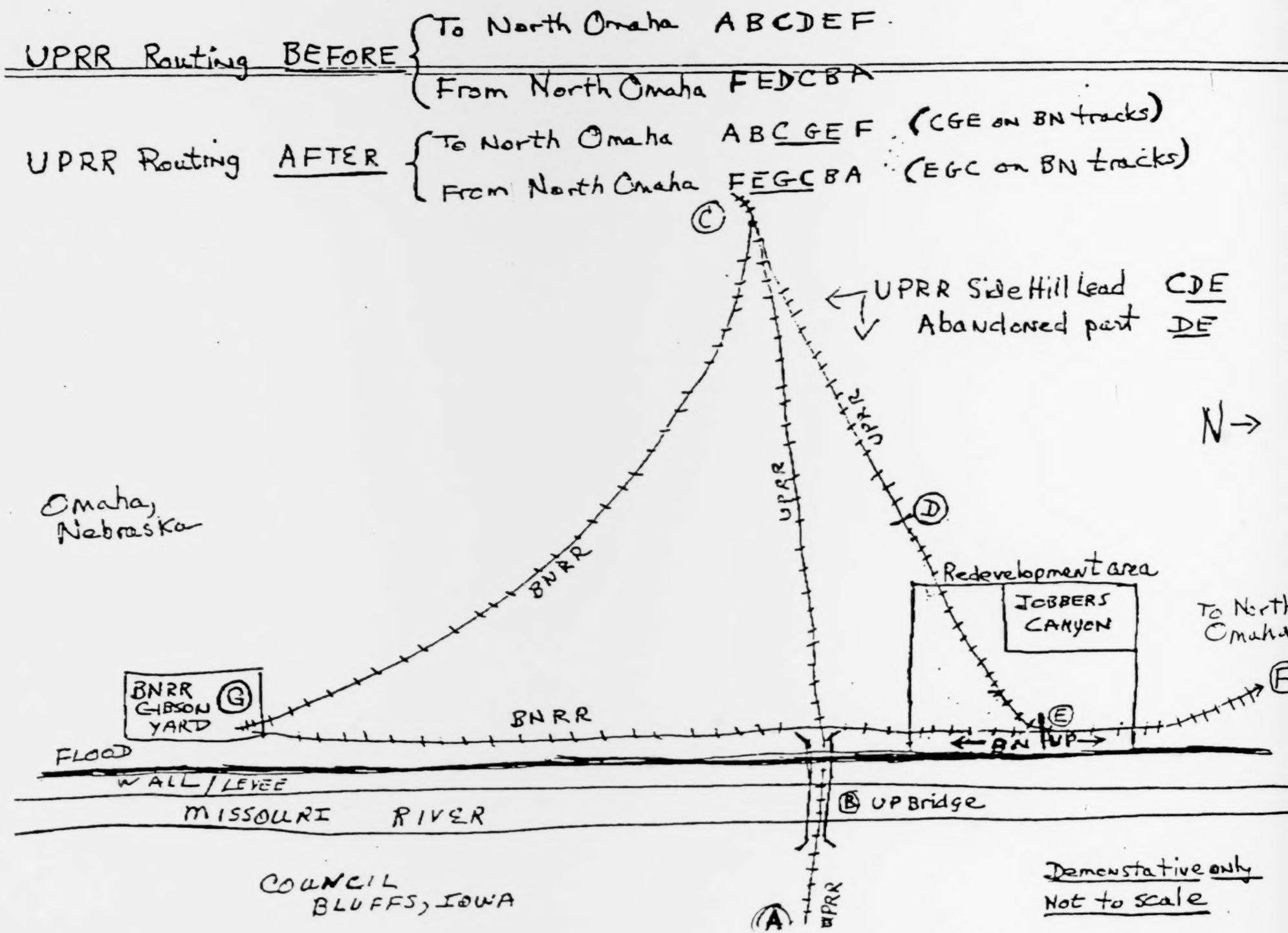
UPRR Routing BEFORE
To North Omaha A B C D E F
From North Omaha F E D C B A
UPRR Routing AFTER
To North Omaha A B C G E F (CGE on BN tracks)
From North Omaha F E G C B A (EGC on BN tracks)
UPRR Side Hill Lead CDE
Abandoned part DE
N
Omaha, Nebraska
BNRR
UPRR
UPRR
Redevelopment area
JOBBERS CANYON
To North Omaha
BNRR GIBSON YARD G
BNRR
BN UP
FLOOD WALL / LEVEE
MISSOURI RIVER
B UP Bridge
COUNCIL BLUFFS, IOWA
A
UPRR
Demonstative only
Not to scale